160 U.S. 646

160 — 646

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 736.

THE CHEMICAL NATIONAL BANK OF CHICAGO, PLAINTIFF IN ERROR,

vs.

CITY BANK OF PORTAGE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

FILED SEPTEMBER 21, 1895.

(16,026.)

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1 State of Illinois Supreme Court, Central Grand Division, *ss:*

At a supreme court begun and held at Springfield on the first Tuesday in the month of January, in the year of our Lord one thousand eight hundred and ninety-five, the same being the first day of January, in the year of our Lord one thousand eight hundred and ninety-five.

Present: Jacob W. Wilkin, chief justice; David J. Baker, justice; Jesse J. Phillips, justice; Alfred M. Craig, justice; Joseph N. Carter, justice; Benjamin D. Magruder, justice; Joseph M. Bailey, justice.

Be it remembered that on the second day of January, in the year of our Lord one thousand eight hundred and ninety-five, there was filed in said supreme court a record from the superior court of Cook county, State of Illinois, and a record from the appellate court of the first district, State of Illinois; which said records were in words and figures following, to wit:

2 UNITED STATES OF AMERICA.

STATE OF ILLINOIS, } *ss:*
County of Cook, }

Pleas before the Honorable John Barton Payne, one of the judges of the superior court of Cook county, in the State of Illinois, holding a branch court of said court, at a regular term of said superior court of Cook county begun and holden at the court-house, in the city of Chicago, in said county and State, on the first Monday, being the fifth day, of March, in the year of our Lord one thousand eight hundred and ninety-four, and of the Independence of the United States of America the one hundred and eighteenth.

Present: The Honorable John Barton Payne, judge of the superior court of Cook county; Jacob J. Kern, State's attorney; James H. Gilbert, sheriff of Cook county.

Attest: STEPHEN D. GRIFFIN, *Clerk.*

Be it remembered that heretofore, to wit, on the seventeenth day of January, in the year of our Lord one thousand eight hundred and ninety-four, there was filed in the office of the clerk of the superior court of Cook county a certain precipe, which is in words and figures as follows, to wit:

3 STATE OF ILLINOIS, } *ss:*
County of Cook, }

Superior Court of Cook County, January Term, A. D. 1894.

CITY BANK OF PORTAGE, Plaintiff,
vs.
THE CHEMICAL NATIONAL BANK OF CHICAGO, Defendant.

Assumpsit.
Damages, $6,000.00.

The clerk of said court will issue a summons in the above-entitled cause to said defendant in a plea of trespass on the case on promises,

to the damage of said plaintiff in the sum of six thousand dollars, direct the same to the sheriff of Cook county to execute, and make it returnable to the February term of said court, A. D. 1894.

TENNEY, CHURCH & COFFEEN,
Plaintiff's Attorney-.

To Stephen D. Griffin, Esq., clerk.
Chicago, Jan'y 17, 1894.

And on the day and year last aforesaid, to wit, January 17, A. D. 1894, there issued out of the office of the clerk of said court the people's writ of summons; which writ, with the return of the sheriff thereon endorsed, is in words and figures as follows, to wit:

STATE OF ILLINOIS, } ss:
Cook County, }

The People of the State of Illinois to the sheriff of said county, Greeting:

We command you that you summon the Chemical Na-
4 tional Bank of Chicago, if it shall be found in your county, personally to be and appear before the superior court of Cook county on the first day of the term thereof, to be holden at the court-house, in the city of Chicago, in said Cook county, on the first Monday of February next, to answer unto City Bank of Portage in a plea of trespass on the case upon promises, to the damage of said plaintiff, as it is said, in the sum of six thousand dollars.

And have you then and there this writ, with an endorsement thereon in what manner you shall have executed the same.

Witness Stephen D. Griffin, clerk of our said court, and
[SEAL.] the seal thereof, at Chicago aforesaid, this 17th day of February, A. D. 1894.

STEPHEN D. GRIFFIN.

P'd $1.00. Served this writ on the within-named defendant, The Chemical National Bank of Chicago, by delivering a copy thereof to A. T. Ewing, vice-president of said bank, this 19th day of January, 1894; the president of said bank not found in my county.

JAMES H. GILBERT, *Sheriff*,
By D. W. NICKERSON, *Deputy*.

And afterwards, to wit, on the 31st day of January, A. D. 1894, there was filed in the office of the clerk of said court a certain declaration, which is in words and figures as follows, to wit:

In the Superior Court of Cook County, February Term, A. D. 1894.

STATE OF ILLINOIS, } ss:
Cook County, }

5 The City Bank of Portage, Wisconsin, which is a corporation organized and doing business under the laws of Wisconsin, plaintiff in this suit, by Tenney, Church & Coffeen, its attorneys,

complains of The Chemical National Bank, which is a corporation organized and lately doing business under the national bank act and now in the hands of E. C. Tourtelotte, receiver, defendant in this suit, summoned, etc., of a plea of trespass on the case of promises—

For that whereas the said defendant heretofore, to wit, on the 15th day of February, in the year of our Lord one thousand eight hundred and ninety-three, at Chicago, to wit, in the county aforesaid, made its certain note in writing, commonly called a promissory note, bearing date the day and year last aforesaid, and then and there delivered the said note to Theorore Wetmore, by which said note the said defendant, by the name, style, and description of C. E. Braden, promised to pay to the order of said Theodore Wetmore five thousand dollars, four months after date, at the Chemical National Bank of Chicago, with interest at six per cent. per annum, for value received.

And the said Theodore Wetmore, to whom or to whose order the payment of the said sum of money in the said note specified was to be made as aforesaid, afterwards and before the payment of the said sum of money mentioned in the said note or any part thereof, and also before the time limited and appointed by the said note for the payment thereof, to wit, on the same day and year and at the place aforesaid, endorsed the said note in writing, and by that endorsement ordered and appointed the said sum of money in the said note specified to be paid to the said plaintiff or order, and then and there delivered the said note so endorsed as aforesaid to the said plaintiff, of which said endorsement so made thereon
6 as aforesaid the said defendant afterwards, to wit, on the same day and year and at the place aforesaid, had notice.

By reason whereof and by force of the statute in such case made and provided the said defendant became liable to pay to the said plaintiff the said sum of money in the said note specified according to the tenor and effect of the said note and of the said endorsement so thereon made as aforesaid, and, being so liable, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year and at the place aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said sum of money in the said note specified according to the tenor and effect of the said note and of the said endorsement so thereon made as aforesaid.

And whereas also the said defendant afterwards, to wit, on the 1st day of March, in the year of our Lord one thousand eight hundred and ninety-three, in said county, became and was indebted to the said plaintiff in the further sum of five thousand dollars, of lawful money of the United States of America, for money before that time lent and advanced by the said plaintiff to the said defendant and at the special instance and request of the said defendant.

And in the like sum for other money by the said plaintiff before that time paid, laid out, and expended for the said defendant and at the like special instance and request of the said defendant.

And in the like sum for other money by the said defendant before that time had and received to and for the use of the said plaintiff.

And in the like sum for other money before that time and then due and owing the said plaintiff for interest upon and for the
7 forbearance of divers other sums of money before that time and then due and owing from said defendant to said plaintiff.

And in the like sum for goods, ware, and merchandise before that time sold and delivered by the said plaintiff to the said defendant at the like special instance and request of the said defendant.

And in the like sum for the price and value of work then done and material for the same provided by the said plaintiff for the said defendant and at the like special request of the said defendant.

And, being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on day and year aforesaid and at the place last aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the several sums of money in this count mentioned when the said defendant should be thereunto afterwards requested.

And whereas also the said defendant afterwards, to wit, on the day and year last aforesaid and at the place last aforesaid, accounted together with the said plaintiff of and concerning divers other sums of money before that time due and owing from the said defendant to the said plaintiff and then and there being in arrear and unpaid, and upon such accounting the said defendant then and there was found to be in arrear and indebted to the said plaintiff in the further sum of five thousand dollars, of like lawful money as aforesaid.

And, being so found in arrear and indebted to the said plaintiff, the said defendant, in consideration thereof, afterwards, to wit. on the day and year last aforesaid and at the place last aforesaid, undertook and then and there faithfully promised the said
8 plaintiff well and truly to pay unto the said plaintiff the sum of money last mentioned when the said defendant should be thereunto afterwards requested.

Nevertheless, the said defendant, although often requested, etc., to wit, on the day when the said note became due and payable according to the tenor and effect thereof and oftentimes since, to wit, at the place last aforesaid, has not yet paid the said several sums of money above mentioned or any or either of them or any part thereof to the said plaintiff, but to pay the same or any part thereof to the said plaintiff the said defendant has hitherto wholly neglected and refused and still do- neglect and refuse, to the damage of the said plaintiff of six thousand dollars, and therefore the said plaintiff brings suit, etc.

TENNEY, CHURCH & COFFEEN,
Plaintiff's Attorneys.

Copy of Instrument and Account Sued On.

Protested for non-payment June 17th, 1893.

A. W. MARTIN,
Notary Public.

$5,000. CHICAGO, ILL., *Feb'y 15th*, 1893.

Four months — days after date I promise to pay to the order of Theodore Wetmore five thousand dollars at Chemical National Bank of Chicago, value received, with interest at the rate of six per cent. per annum after due, having deposited with this note, as collateral security, certificate N-. 477, for fifty shares stock
No. 2883. of Chemical National Bank of Chicago, per value, $100
June 18. per share, which said security or any part thereof I hereby give the legal owner or owners authority to sell on the maturity of this note, or at any time thereafter or before in the event of said security depreciating in value, at public or
9 private sale, at his discretion, without advertising the same or giving me any notice, and to apply so much of the proceeds thereof to the payment of this note as may be necessary to pay the same, with all interest due thereon, and also to the payment of all expenses attending the sale of said collateral security; and in case the proceeds of the sale of said collateral security shall not cover the principal, interest, and expenses, I promise to pay the deficiency forthwith after such sale, with interest at six per cent. per annum.

And it is hereby agreed and understood that if recourse is had to said collateral any excess of collateral upon this note shall be applicable to any note or claim held by said owner or owners against me, and in case of any exchange of or addition to the collateral above named the provisions of this note shall extend to such new or additional collateral.

C. E. BRADEN.

Endorsed: Without recourse. Theodore Wetmore. Pay Union National bank, Chicago, or order, for account City Bank of Portage, Wisconsin. M. T. Alverton, cashier.

Chemical National Bank of Chicago to City Bank of Portage, Dr.

To goods, wares, and merchandise sold and delivered	$6,000
To money lent and advanced	6,000
To money paid, laid out, and expended	6,000
To money had and received to and for the use of said plaintiff	6,000
To money due for interest and forbearance	6,000
To labor, services, and material	6,000
To balance due on account stated	6,000

10 And afterwards, to wit, on the 10th day of February, A. D. 1894, there was filed in the office of the clerk of said court a certain plea, which is in words and figures as follows, to wit:

STATE OF ILLINOIS, } ss :
Cook County, }

Superior Court Thereof, February Term, A. D. 1894.

THE CHEMICAL NATIONAL BANK OF CHICAGO } Assumpsit.
ats.
THE CITY BANK OF PORTAGE, WISCONSIN. }

And the defendant, by Duncan and Gilbert, its attorneys, comes and defend*a* the wrong and injury, when. etc., and says that it did not undertake or promise in any manner and form as the plaintiff has above thereof complained against it; and of this it puts itself upon the country, &c.

And for a further plea in this behalf the defendant says that the plaintiff ought not to have its aforesaid action against it, the defendant, because it says that the several supposed causes of action in the said declaration mentioned are one and the same, to wit, the supposed cause of action in the first count of plaintiff's declaration mentioned and not different causes of action, and that it, the defendant, did not make, execute, or deliver the promissory note mentioned in said first count of the plaintiff's declaration, a copy of which said promissory note is filed with said declaration, in manner and form as the plaintiff has above in that behalf alleged; and of this the defendant puts itself upon the country.

DUNCAN & GILBERT,
Defendant's Attorneys.

11 STATE OF ILLINOIS, } ss :
Cook County, }

E. C. Tourtelot, being duly sworn, on his oath deposes and says that he is the receiver of the defendant in the above-entitled cause, The Chemical National Bank of Chicago, appointed as such by the Comptroller of the Currency of the United States on or about the 15th day of January, A. D. 1894, said Chemical National Bank of Chicago having become insolvent on or about the 11th day of May, A. D. 1893.

Affiant further says that he has read the foregoing plea, and that the same is true to the best of his knowledge, information, and belief.

E. C. TOURTELOT.

Subscribed and sworn to before me this 9th day of February, A. D. 1894.

[SEAL.] STALHAM L. WILLIAMS, JR.,
Notary Public.

And afterwards, to wit, on the 7th day of March, A. D. 1894, the same being one of the days of the March term of said court, the following, among other, proceedings were had in said court and entered of record, to wit:

CITY BANK OF PORTAGE
vs.
THE CHEMICAL NATIONAL BANK OF CHICAGO. } Assumpsit.

On the agreement of the parties to this suit now here made in open court this cause is submitted to the court for trial without a jury, and the court now here, after hearing all the evidence adduced, the arguments of counsel, and being fully advised in the premises,
finds the issues for the plaintiff and assesses its damages at
12 the sum of fifty-two hundred and twenty-six dollars and sixty-seven cents.
Whereupon the defendant submits herein its motion for a new trial in said cause.

And afterwards, to wit, on the 13th day of March, A. D. 1894, the same being one of the days of the March term of said court, the following, among other, proceedings were had in said court and entered of record, to wit:

CITY BANK OF PORTAGE
vs.
THE CHEMICAL NATIONAL BANK OF CHICAGO. } 155,551. Assumpsit.

This cause coming on to be heard upon the defendant's motion heretofore entered herein for a new trial in said cause, after arguments of counsel and due deliberation by the court said motion is overruled and a new trial denied. Therefore it is considered by the court
that the plaintiff do have and recover of and from the
$5,226.67. defendant its damages of fifty-two hundred and twenty-six dollars and sixty-seven cents in form as aforesaid by the said court assessed, together with its costs and charges in this behalf expended, and have execution therefor.
Whereupon the defendant enters its exceptions herein, which is allowed on filing its bill of exceptions within thirty days from this date.

And afterwards, to wit, on the 17th day of March, A. D. 1894, the same being one of the days of the March term of said court, the following, among other, proceedings were had in said court and entered of record, to wit:

13 CITY BANK OF PORTAGE
vs.
THE CHEMICAL NATIONAL BANK OF CHICAGO. } 155,551. Assumpsit.

This cause coming on to be heard upon the defendant's motion heretofore entered herein for a new trial in said cause, after arguments of counsel and due deliberation by the court said motion is overruled and a new trial denied.
Therefore it is considered by the court that the plaintiff do have and
recover of and from the defendant its said damages of
$5,226.67. fifty-two hundred and twenty-six dollars and sixty-seven cents in form as aforesaid by the court assessed, to-

gether with its costs and charges in this behalf expended, and have execution therefor.

And afterwards, to wit, on the 22nd day of March, A. D. 1894, the same being one of the days of the March term of said court, the following, among other, proceedings were had in said court and entered of record, to wit:

CITY BANK OF PORTAGE
vs.
THE CHEMICAL NATIONAL BANK OF CHICAGO. } 155,551. Assumpsit.

Now, on this day, it is ordered that the judgment entered herein of record on the seventeenth day of March, A. D. 1894, be, and is hereby, set aside and vacated.

And afterwards, to wit, on the 24th day of March, A. D. 1894, there was filed in the office of the clerk of said court a cer-
14 tain bill of exceptions, which is in words and figures as follows, to wit:

In the Superior Court of Cook Co., —— Term, A. D. 189–.

Before John Barton Payne, J.

CITY BANK OF PORTAGE
vs.
CHEMICAL NAT'L BANK OF CHICAGO.

MARCH 7TH, 1894.

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Charles E. Braden	1	6
J. O. Curry	13	17

STATE OF ILLINOIS, } *ss:*
County of Cook, }

In the Superior Court of Cook County.

CITY BANK OF PORTAGE
vs.
CHEMICAL NATIONAL BANK OF CHICAGO.

Be it remembered that heretofore, to wit, upon the seventh day of March, A. D. 1894, at 3.15 o'clock p. m., the above-entitled cause came on for hearing before his honor John Barton Payne, one of the judges of said court, a jury having been waived by agreement and the cause submitted to the court for trial.

Messrs. Tenney, Church & Coffeen, counsel for plaintiff, and Messrs. Duncan & Gilbert, counsel for defendant.

15 And thereupon the plaintiff, to maintain the issues upon its part, introduced the following evidence:

CHARLES E. BRADEN, produced as a witness on behalf of the plaintiff, being first duly sworn, was examined in chief by Mr. Tenney, and testified as follows:

Q. What is your business, Mr. Braden?

A. I am secretary and auditor of the Hicks Stock Car Company.

Q. You were cashier of the defendant, The Chemical National Bank?

A. I was.

Q. During what time?

A. From January 1st, 1893.

Q. And until what time?

A. I suppose I am still cashier.

Q. You have never resigned your office?

A. I never have resigned my office.

Q. Who was president during this time?

A. J. O. Curry.

Q. You are familiar with the facts connected with the execution of this note of February 15th, 1893, for five thousand dollars, upon which this suit is based, are you not?

A. I am.

Q. Will you state to the court, briefly just what the transaction was, beginning at the beginning?

A. About the—along in January or February some time it was necessary to protect some previous debts contracted—that is, debts to the bank—to take some of its stock, which, under the United States statute, it has a perfect right to do. It is privileged to hold the stock for six months, and then it must be sold; but Mr. Curry had repeatedly asked the national bank examiner how to carry this. It was stock already issued and paid for, and the bank examiner hadn't seen fit to furnish him the information, so it
16 seemed that some of the stock had been carried to protect notes signed by the assistant cashier to carry through brokers, and it was carried in just about that form, I guess—the most of it—and a note was called one day by a firm of brokers after it had been running about fifteen days, and I noticed the transaction——

Q. When you say called what do you mean?

A. They demanded payment on it. It was a demand note, and it was called.

Q. Whose note was that that was called?

A. George E. Hopkins'.

Q. Who was he?

A. Assistant cashier of the bank.

Q. For what had that note been given?

A. Some of the same stock, and I suppose that had been bought in by the bank.

Q. Did Hopkins own the stock?

A. He did not.

Q. State how his name was used in the transaction.

A. His name was used, the same as this transaction, by having the stock transferred to his name, giving a note payable on demand

to some brokerage firm whose name I do not remember now, and the stock belonged to the bank, and the note was paid by the bank, and——

Q. Who got the money on the note when it was first given?

A. —so I remarked it was a poor thing to have a demand note out, but I thought maybe a certain broker, a friend of mine, in Minneapolis might sell a note for me for a specified time, and Mr. Curry, the president, and Mr. Hopkins, who was the assistant cashier, thought that would be a good thing to do, so I had correspondence with this gentleman. I thought it was to be the bank's obligation, the bank to pay it, and I didn't pay for the stock, the stock assigned there. I did not receive any of the money. The bank sent the note to the Metropolitan Bank of Minneapolis, which was the Minneapolis correspondent of the Chemical National
17 bank, and the books of the bank——

Q. The books of what bank? You must be more specific.

A. —of the Chemical National bank will show that Mr. Theodore Wetmore, acting as broker, deposited $4,885.00—I think that is the exact amount—and the Chemical National bank charged on its books Metropolitan National bank $4,885, and charged interest account, $115.00.

Q. Was this note which I have shown you here the note which you signed in pursuance of that agreement?

A. That is the one.

Q. I show you also certificate of stock for 50 shares of the stock of the Chemical National bank, certificate No. 47, certifying that C. E. Braden is the owner of fifty shares of stock, and state whether or not this is the certificate that was sent with the note.

A. Yes; that is the certificate.

Mr. TENNEY: I offer these two in evidence. I suppose you have seen them (addressing Mr. Gilbert)?

Mr. GILBERT: Yes. I object to the note.

Mr. TENNEY: You have stated, Mr. Braden, that the note was sent to what bank?

A. The Metropolitan National bank, which is the correspondent of the Chemical National bank.

Q. Now, then, did the money which was realized on the note when it was sold by Mr. Wetmore to the plaintiff come to you or did it *do* to the Chemical National bank?

A. It went to the Chemical bank.

Q. You never received the money at all?

A. I never have received the money nor any portion of it.

Q. Did you owe Mr. Wetmore any money or was the note given for any contract?

A. No; I didn't owe Mr. Wetmore anything, and I never did.

Q. It was not given on account of any transaction between you and him?

18 A. No, sir; there was nothing making me his debtor to the extent of one cent.

Q. State whether or not this fifty-share certificate, after it was issued in this way, was treated by the Chemical National bank as

stock which you owned and whether there was any transaction about it.

A. Do you mean after the suspension of that bank?

Q. Yes.

A. When the comptroller ordered a forty per cent. assessment there were, including the stock, one hundred and twenty-five shares standing in my name, but I had previously explained to the national bank examiner in charge, a Mr. Lynch, the then bank examiner, who had charge of all the banks during the suspension of the Columbia and Evanston National, etc., so that when McKeon, the examiner in charge, sent out his notices I was noticed to pay a forty per cent. assessment on seventy-five shares. That is the amount of my stock, and this would made it 125, so that the directors and bank examiners considered it as treasury stock.

Q. Have you ever done anything with this stock as a stockholder?

A. No, sir; whenever I have voted as a stockholder I have voted the balance of my stock—seventy-five shares.

Cross-examination by Mr. GILBERT:

Q. This fifty shares of stock was bought on the stock exchange, was it not, by some brokers?

A. I don't so understand it. About that time we had to take—to secure some debts we had to take some stock in.

Q. Whose stock did you have to take in?

A. We had to take quite an amount from W. F. Giddings, or L. R. Giddings, I guess it is.

Q. Was this any of his stock?

19 A. I don't know positively that this is any of his stock, but at that time we had to take in quite an amount of his stock.

Q. Well, didn't Mr. George Hopkins give his note for $5,000 for fifty shares of stock to the brokers who bought it?

A. I think not. I don't so understand it.

Q. Well, where did you understand this stock came from?

A. Why, it was some of the stock, as I understood, that had to be taken in by the bank to secure money previously loaned.

Q. You do not know whose loan it was?

A. No; I did not make the transfer of stock at the time it was transferred and I couldn't say positively what stock it is.

Q. What was the purpose of the Chemical National bank borrowing money at that time?

A. As I explained in my testimony, Mr. Curry had asked the bank examiner how to carry that stock, had explained to him when he was there, just about that time, what stock we had in the bank, and I overheard a conversation between them, and Mr. Sturgis didn't give him any information on the subject, but along about April, I think it was, Mr. Curry or Mr. Ewing, the vice-president of the bank, had a talk with Mr. Hepburn, the then Comptroller of the Currency, as to how stock like this ought to be carried, and he told

him to charge it to stocks and bonds, so all other stock except this lot which was outstanding was charged to stocks and bonds.

Q. Was the Chemical National bank short of money at that time?

A. Well, it wasn't particularly short. It was a little short, having pretty lively times.

Q. In February, 1893?

A. We were having a pretty lively time just at that time.

20 Q. What was its surplus or reserve at that time?

A. I don't know, Judge.

Q. Did it ever borrow money of anybody else during that time?

A. In that way?

Q. Yes.

A. Shortly after that there was a couple of notes given by Mr. Hopkins to the First National Bank of Batavia under similar circumstances. Captain Newton was president of the —— National Bank of Batavia and he understood just what the stock was.

Q. What stock was this?

A. It was some of that same treasury stock. I don't know whom it came from.

Q. Stock which you claim the bank had to take in to protect itself?

A. I presume it was some of that stock, although I don't know positively what stock it was.

Q. Now, isn't it true that all this stock was all bought upon the stock exchange?

A. No.

Q. Through brokerage?

A. No.

Q. It was not?

A. Not all of it. There may have been possibly some of it bought that way.

Q. Well, you say brokers called the demand note?

A. Well, Mr. Hopkins, as I understand it, gave his note and the brokers called the money.

Q. For fifty shares of stock?

A. Well, I don't know how many shares of stock, whether 50 or 100, but he got it and the bank got the money, paid the brokers a quarter of one per cent. commission for negotiating the loan, the regular commercial-paper rate paid to brokers——

Q. And Hopkins did give his note for the stock that was bought?

21 A. No; I think he took some stock that was in the bank. I could not say positively, because I knew nothing of the transaction when the loan was made.

Q. He took some stock that was already in the bank?

A. Yes; as I understand it.

Q. Why would he give his note to brokers for stock that was already in the bank?

A. Because the bank owned the stock and got the money from the brokers for the stock and the money from the brokers should

have been the money of the bank. The bank got the stock out of the way for the time being in that way. I knew nothing of the transaction with Hopkins until the note was called--that is, payment demanded—so that that is the first information I had. Any other information I have on the subject is merely hearsay. The first intimation I had that the notes were out was when, as I say, when the notes were called, payment demanded, and I saw they were only out for ten or fifteen days and the bank was paying six per cent. interest and a quarter of one per cent. brokerage, and I remarked I thought it would be better for the notes to be out for a specified time, and thereupon Mr. Curry, Hopkins, and I agreed if I could place five or ten thousand through a broker in Minneapolis, why it would be treated as a bank obligation and the bank would pay it and it would have fifty or one hundred shares of the stock, as the case might be, transferred to my name.

Q. This transaction is a thing I don't understand. I would like to have you explain why, if the bank took in stock for a precedent debt of some stockholder, why didn't it take it directly? Why it resorted to the means of having Hopkins give his note to a broker?

22 A. Well, I presume the other witness can tell more about that transaction than I can, for, as I can say, all I know about that transaction is hearsay, because I knew nothing of the transaction when it was made.

Q. But you do know that a demand note which the brokers held against the bank—which the holders held against Hopkins—a demand note made by Hopkins to the brokers was called?

A. I know that. That is the first I knew of the transaction.

Q. And the brokers demanded payment of it?

A. Yes; the brokers demanded payment of it.

Q. Now, that money was paid out of money of the bank?

A. To the brokers; yes.

Q. Hopkins' note was taken up?

A. Yes.

Q. And thereupon you executed your note to get the money to replace that that was taken out?

A. That is correct; to get the money for the bank, and took the stock out of the bank for the time being. The whole difficulty was we could not get the bank examiner, who has since been deposed from office, to give any information as to how that stock should be carried.

Q. What I want to know is whether that is not a true statement of the transaction—that Hopkins gave his individual note to the brokers for stock.

A. No; I can't testify positively on that, but my hearsay evidence is not that.

The COURT: Well, don't let us have too much of that in the record.

The WITNESS (continuing): So that I say the witness that you will call can tell more about that original transaction.

Q. You knew that Hopkins' note was called?
23 A. I knew that Hopkins' note was called.
Q. And you or the bank paid the note?
A. Yes.
Q. And thereupon you borrowed money through Wetmore to replace that which was used to pay the Hopkins note?
A. Well, shortly thereafter.
Q. That is what it was for, isn't it?
A. Yes.
Q. And the purpose was to cover up this transaction so that it would not appear that the bank had bought its own stock?
A. To get the money for the bank, but we didn't know just how we could carry that, and I don't think any of the officers of the bank had ever had any experience like that.
Q. Who authorized you to borrow money for the Chemical National bank?
A. The president.
Q. Anybody else?
A. Some of the directors knew of the transaction.
Q. The board of directors didn't authorize it?
A. It was not done at board of directors' meeting; no.
Q. They didn't authorize you to give your note for the bank?
A. No; but the cashier of the bank is authorized at any time without authority from the president or board of directors to borrow money for the bank.
Q. He is?
A. Yes, sir.
Q. Well, the bank was not needing money?
A. It was. It was short at that time. Inquiries had been coming quite heavily against us. Our deposits had been running down. I saw a book in your office a few days ago that I can refer you to because that says the cashier can have authority at any time
24 without special authority from the board of directors to borrow money for the bank.
The COURT: Do you mean by resolution?
A. Without any resolution the cashier of any bank——
The COURT: Do you mean there was a resolution?
A. No, sir; there was no such resolution, but I say as a matter of fact the cashier of a bank has authority at any time to borrow money for his bank.

Thereupon the plaintiff offered in evidence the promissory note described in the declaration, which was and is in the words and figures following:

$5,000. CHICAGO, ILL., *Feb'y 15th*, 1893.

[Written across the face:] Protested for non-payment June 7th, 1893. A. W. Martin, notary public.

Four months —— days after date I promise to pay to the order

of Theodore Wetmore five thousand dollars at Chemical
June 18. National Bank of Chicago, value received, with interest at the rate of six per cent. per annum after due, having deposited with this note as collateral security certificate No. 477 for fifty shares of stock of Chemical National Bank of Chicago, par value $100 per share, which said security or any part thereof I hereby give the legal owner or owners authority to sell
No. 2883. on the maturity of this note or at any time thereafter or before in the event of said security depreciating in value at public or private sale, at his discretion, without advertising the same or giving me any notice, and to apply so much of the proceeds thereof to the payment of this note as may be necessary to pay the same, with all interest due thereon, and also to the payment of all expenses attending the sale of said collateral security,
25 and in case the proceeds of the sale of said collateral security shall not cover the principal, interest, and expenses I promise to pay the deficiency forthwith after such sale, with interest at six per cent. per annum; and it is hereby agreed and understood that if recourse is had to said collateral any excess of collateral upon this note shall be applicable to any other note or claim held by said owner or owners against me, and in case of any exchange of or addition to the collateral above named the provisions of this note shall extend to such new or additional collateral.

C. E. BRADEN.

To the introduction of which promissory note in evidence the defendant, by its counsel, then and there objected; but the court overruled the objection and permitted the promissory note to be read in evidence; to which ruling of the court the defendant, by its counsel, then and there excepted.

Thereupon the plaintiff further offered and read in evidence a certificate in due form for 50 shares of stock of the Chemical National Bank of Chicago, being certificate numbered 47, certifying that C. E. Braden is the owner of 50 shares of the capital stock of said Chemical National Bank of Chicago, said certificate being dated Feb. 15, A. D. 1893, being the certificate identified by the witness Braden.

Thereupon the plaintiff rested.

Whereupon the defendant, to maintain the issues on its part, by its counsel, introduced the following evidence:

J. O. CURRY, produced as a witness on behalf of the defendant, being first duly sworn, was examined in chief by Mr. Gilbert, and testified as follows:

26 Q. What is your name?

A. J. O. Curry.

Q. You *are* president of the Chemical National bank during the year 1893, were you not, until it suspended?

A. Yes, sir.

Q. Are you familiar with the facts relating to this transaction that is in controversy here?

A. Yes, sir.

Q. You may state all the facts that led up to the giving of this note by Mr. Braden.

A. Well, I guess I will begin clear back and say that the directors—some of them—had a talk in directors' meeting and proposed to buy in an amount of stock, from — up to $100,000, and instructed me, not of record, but in meeting, to buy any amounts that were offered at par up to that amount, and that they would take it at different times as their money came in.

Q. They would take it individually?

A. Yes; individually. There was no thought of buying any stock for the bank except some of the Giddings stock that was taken for debt; then, I think, this stock was originally bought on the exchange by a broker and never came to the bank, and Hopkins went there and gave his note and left the stock with it.

Q. Hopkins was the assistant cashier?

A. Hopkins was the assistant cashier.

Q. He gave his individual note to the brokers?

A. He gave his individual note and left the stock with it until they wanted the money, asked him for it; it was a demand note; then this transaction was entered into.

Q. When the money was demanded what was done toward paying it?

A. The cashier's check was given for it, I think.

27 Q. In other words, the money was taken out of the Chemical bank to pay for it?

A. Yes; for a short time.

Q. And the certificate then turned over to you or the cashier?

A. Yes, sir; it was in charge of the cashier.

Q. What was done with the certificate after it was turned over—after the Hopkins note was paid?

A. It was cancelled and a new one issued to Mr. Braden.

Q. For what purpose?

A. For him to put with the note, as he testified, to take the stock out of the bank and the money in temporarily *in* until the directors got their money in.

Q. Thereupon Mr. Braden gave this note—borrowed the $5,000?

A. Yes, sir.

Q. And the proceeds were used to replace what had been taken out to pay Mr. Hopkins' notes?

Mr. TENNEY: That is a little bit leading.

The WITNESS: Well, I would not be able to say that it was to replace that or not. It was to replace the stock. The stock had never been entered in any way on the books, so that the money which Mr. Braden got took the place of the stock the same as if it had never been bought.

Q. Was any other entry made of the transaction by which the Hopkins note was paid?

A. No, sir.

Q. How was that carried along?

A. Well, that was paid for, as I said before, by the cashier's check and that taken in place of it. Next day I think it was paid out.

Q. Then your books don't show that the bank had paid the Hopkins note?

A. No; I think not.

The COURT: But the books did show that the stock had been bought?

28 A. No, sir. It showed the transfer when the transfer was made; it showed that.

Q. What do you mean by saying that that was taken in? Do you mean the stock was treated as owned by the bank?

A. No—well, it was treated no way. It was treated as cash over one night. It was a temporary transaction, you see—very.

Mr. GILBERT: Was the stock bought for the bank or for the individual directors?

The question was objected to by counsel for plaintiff as immaterial.

The objection was sustained by the court; to which ruling defendant, by its counsel, then and there excepted.

Q. The stock was bought by Hopkins, was it not, giving his note for it?

A. Well, that was a settlement for it; yes, sir. It was bought in pursuance of the order given me and I gave to the broker.

Q. Was an order given by the directors, the individual directors?

A. It was given in the full board, but I don't think it appears on record. They talked it over in meeting.

Q. Was the order given you to buy stock for the bank itself or buy it for individual directors?

A. Well, each individual director didn't say buy me so much. They said, You buy that in and pay for it with the money of the bank and we will take it. There was no idea of holding it in the bank longer than we could help.

Q. You knew, I suppose, it was contrary to law for the bank to buy its own stock in that way?

A. Yes, sir; except upon some conditions.

Q. Except taking it in payment of a precedent debt?

29 A. Yes.

Q. Why was not this money borrowed in the name of the bank?

The question was objected to by counsel for plaintiff.

The objection was sustained by the court; to which ruling the defendant, by its counsel, then and there excepted.

Q. Who authorized Mr. Braden to borrow this money for anybody?

A. Well, I approved of the action of the assistant cashier.

Q. The stock was attached to the note?

A. I believe so; yes, sir.

Q. And it never appeared in any way as a part of the assets of the bank, did it?

Mr. TENNEY: Appeared where, do you mean?

Mr. GILBERT: Anywhere upon the books of the bank.

A. No, sir; I think not.

Q. Did the books of the bank show that the bank had been buying its own stock?

A. No.

Q. You may state whether or not the giving of this note was done for the purpose of evading the law.

Objected to by plaintiff's counsel.

The objection was sustained by the court; to which ruling defendant, by its counsel, then and there excepted.

Q. What was the purpose of it?

A. The purpose was to——

The COURT: I think he would only state what the facts are. Leave the purpose to be inferred from the fact.

The WITNESS: I would like to say something on that point.

Mr. GILBERT: Well, if you desire to make any explanation I have no objection.

30 A. I don't mean any explanation, but I would like to say if it is admissible that neither the bank nor any of its officers or directors supposed they had anything to cover up then or any other time.

Cross-examination by Mr. TENNEY:

Q. When you say the books of the bank do not show this as an asset you don't mean that if a full investigation was made into all the entries and the items of cash and the security that the bank——

A. What?

Q. It was not hidden away, was it?

A. No, sir.

Q. The teller had not this identical certificate, but the certificate that was taken for the $5,000 note of Hopkins, the teller had that?

A. Between the two notes, the teller had that certificate; yes.

Q. And then the cashier's check that was given for that could have been traced so as to show what the transaction was?

A. Yes, sir.

Q. When you say the bank's books didn't show this as an asset you mean it was inventoried as an asset of the bank?

A. I don't know whether that was the meaning of the question. I didn't so state.

Q. You mean that there was no entry made upon the book?

A. There was no entry in the book showing that the Hopkins stock was taken in and belonged to the bank.

Q. You made no entry about it at all?

A. No.

Q. Did it appear in the teller's cash items?

A. Yes.

Mr. GILBERT: Well, it didn't belong to the bank, did it?

31 The question was objected to by counsel for plaintiff.
Objection sustained by the court.

To which ruling of the court defendant, by its counsel, then and there excepted.

Whereupon both parties rested, and the foregoing was all the evidence introduced by either party upon the trial of said cause.

Thereupon the defendant requested the court to hold as law in its decision of the case the following eight propositions and each of them, to wit:

CITY BANK OF PORTAGE
vs.
CHEMICAL NATIONAL BANK OF CHICAGO.

Propositions for Defendant.

If the court finds from the evidence that some of the directors of the Chemical National Bank of Chicago were desirous of purchasing shares of the capital stock of said bank for themselves individually; that in pursuance of such desire they instructed the president of said bank to purchase such an amount of said shares of stock, not exceeding $100,000, par value, as might be offered at par, stating to him that they would take the stock so purchased at different times as their money came in; that in pursuance of such instruction the president of said bank caused a broker to purchase fifty shares of said capital stock, and in payment for said stock one Hopkins, assistant cashier of said bank, gave to said broker his individual note for the purchase price of said stock, payable on demand; that thereafter, payment of said note being demanded from said Hopkins, the president and cashier of said bank paid said note
32 out of the moneys of said bank, and thereupon it was arranged by and between the president, the cashier, and the assistant cashier that the cashier, Braden, should execute his individual note for $5,000 to a broker; that fifty shares of said stock so purchased should be transferred upon the books of the bank to said Braden and attached to said note to be given to said broker as collateral security; that said broker should procure said note to be discounted, and that the money realized by discounting said note should be paid into the moneys of the bank to replace the money of the bank used in paying the Hopkins note, and that in pursuance of such arrangement said Braden gave the note in controversy and the same was discounted and the proceeds were deposited with the moneys of the Chemical National Bank of Chicago, then the court should find that the said note was the individual note of said Braden and not the note of the defendant and should find the issues in favor of the defendant.

Refused.

33 2. If the court believes the testimony given by J. O. Curry in this case to be true and to be a correct statement of the circumstances connected with the execution by Braden of the note sued on, then the court must find the issues joined in favor of the defendant.

Refused.

34 3. Although the court may believe the testimony of Braden to be true, yet his testimony with all inferences that may be justifiably drawn therefrom in favor of the plaintiff does not justify a finding in favor of the plaintiff.

Refused.

35 4. The fact that the money realized upon the note in suit was received by the Chemical National Bank of Chicago does not make said Chemical National Bank of Chicago liable upon said note; and this is true notwithstanding it was agreed by and between Curry, Brade*m*, and Hopkins that the note should be treated as a note of the Chemical National Bank of Chicago and paid by it.

Refused.

36 5. A national banking association is prohibited by law from purchasing shares of its own capital stock unless such purchase shall be necessary to prevent loss upon a debt previously contracted in good faith.

Held.

37 6. The purchase by officers of a national banking association of share- of its own capital stock, unless such purchase is necessary to prevent loss upon a debt previously contracted in good faith, cannot be regarded as a transaction of the association itself unless expressly authorized by its board of directors, and a note executed by an officer in his own individual name for the purpose of borrowing money to make such a purchase cannot be regarded as the note of the association unless recognized as such by its board of directors and unless the lender parted with his money upon the faith of the liability of the association.

Refused.

38 7. There is no evidence in this case legally sufficient to justify a finding that the plaintiff at the time it accepted the note in controversy and advanced money on the same had any knowledge whatever that Braden was not the real principal or that it advanced any money on the note upon the faith of any supposed liability of the defendant upon said note.

Held.

39 8. Although a corporation may be held liable upon a contract that is *ultra vires* or prohibited by law when such contract has been fully executed by the other party, yet where such contract has been entered into by an officer of the corporation in his own individual name and the other party, at the time he performed the same on his part, had no knowledge that the same was for the benefit of the corporation and did not part with any money or property on the faith or the liability of the corporation upon the contract, but, on the contrary, executed the contract on his part in reliance solely upon the individual liability of such officer, such

other party cannot enforce such contract against the corporation as an undisclosed principal.

Refused.

40 And thereupon the court held as law in the decision of the case said propositions numbered five and seven, and accordingly wrote the word "Held" upon each of them; but the court refused to hold as law in the decision of the case said propositions numbered one, two, three, four, six, and eight and each of them and wrote upon said propositions numbered one, two, three, four, and eight and each of them the word "Refused" and wrote upon said proposition numbered six the word "Refused, if it appears that the bank, its officers knowing the facts, used the money."

To which ruling of the court in refusing to hold as law in the decision of the case said propositions numbered one, two, three, four, six, and eight and each of them the defendant, by its counsel, then and there excepted.

The above propositions numbered five and seven were the only propositions offered by either party which were held by the court as law in the decision of the case.

Thereupon the court found the issues joined in favor of the plaintiff and assessed its damages at the sum of $5,226.67; to which finding of the court the defendant, by its counsel, then and there excepted.

Thereupon the defendant moved the court for a new trial herein; which motion was overruled by the court; to which ruling of the court overruling its motion for a new trial the defendant, by its counsel, then and there excepted.

Thereupon the court entered judgment upon such finding in favor of the plaintiff for the sum of $5,226.67 and costs of suit; to the entry of which judgment the defendant, by its counsel, then and there excepted.

41 And forasmuch as the matters and things above set forth do not appear of record, the defendant prays that this its bill of exceptions may be signed and sealed, which is done accordingly.

JOHN BARTON PAYNE, [SEAL.]
Judge Sup. Ct.

O K.
TENNEY.

It is hereby stipulated and agreed by and between the parties that in case of a prosecution of an appeal — a writ of error to review the judgment in the above cause this original bill of exceptions may be incorporated, in lieu of a copy thereof, into the transcript of the record to be used in the prosecution of said appeal or writ of error.

TENNEY, CHURCH & COFFEEN,
Plaintiff's Attorneys.
DUNCAN & GILBERT,
Attorneys for Defendant.

STATE OF ILLINOIS, } ss:
County of Cook, }

I, Stephen D. Griffin, clerk of the superior court of Cook county, in and for the State of Illinois, do hereby certify the above and foregoing to be a true, perfect, and complete transcript of the record except the bill of exceptions, the original of which is, by stipulation of the parties, incorporated herein and made a part hereof, in a certain cause lately pending in said court, on the law side thereof,
42 wherein City Bank of Portage was plaintiff and The Chemical National Bank of Chicago defendant.

In witness whereof I have hereunto set my hand and
[SEAL.] affixed the seal of said court, at Chicago, this 27th day of March, A. D. 1894.

STEPHEN D. GRIFFIN, *Clerk.*

$4 paid by Duncan & G.

Appellate Court of Illinois, First District, October Term, A. D. 1894.

THE CHEMICAL NATIONAL BANK OF CHICAGO, Plaintiff in Error,
vs.
CITY BANK OF PORTAGE, Defendant in Error.
} Error to Superior Court of Cook Co.

And now comes the plaintiff in error, by Dundan & Gil-
43 bert, his attorneys, and says in the record and proceedings of the court below in the above-entitled cause manifest error hath intervened to the prejudice of plaintiff in error, in this:

First. The court below erred in finding the issues in favor of the plaintiff below.

Second. The court below erred in entering judgment in favor of the plaintiff below.

Third. The court below erred in not entering judgment in favor of the defendant below.

Fourth. The court below erred in refusing to hold as law in the decision of the case propositions numbered one, two, three, four, six, and eight, and each of them, requested by the defendant below.

Fifth. The court below erred in admitting improper evidence offered by plaintiff below.

Wherefore, for these and other errors apparent in the record, plaintiff in error prays that the judgment may be reversed, &c.

DUNCAN & GILBERT,
Att'ys for Pl'ffs in Error.

In the Appellate Court, First District, Illinois.

CHEMICAL NATIONAL BANK OF CHICAGO, Plaintiff in Error, *vs.* CITY BANK OF PORTAGE, Defendant in Error. } Error, Cook Superior.

44 I, Thomas G. McElligott, clerk of the appellate court within and for the first district of Illinois, do hereby certify that the transcript of record hereto attached and marked A is the original transcript of record filed in said appellate court on the 19th day of September, A. D. 1894, by said plaintiff.

In testimony whereof I have hereunto set my hand and [SEAL.] seal of said court, at Chicago, this 8th day of December, A. D. 1894.

THOMAS G. McELLIGOTT,
Clerk of the Appellate Court, First District, Illinois.

45 At a term of the appellate court begun and held at Chicago on Tuesday, the second day of October, in the year of our Lord one thousand eight hundred and ninety-four, within and for the first district of the State of Illinois.

Present: Hon. Arba N. Waterman, presiding justice.
" " Joseph E. Gary, justice.
" " Henry M. Shepard, justice.
Thomas G. McElligott, clerk.
James H. Gilbert, sheriff.

CHEMICAL NATIONAL BANK OF CHICAGO *vs.* CITY BANK OF PORTAGE. } No. 5270. Error to Cook Superior.

Be it remembered that on the 17th day of October, A. D. 1894, it being one of the days of said October term, A. D. 1894, certain proceedings were had in said court and entered of record in words and figures following, to wit:

CHEMICAL NATIONAL BANK OF CHICAGO *vs.* CITY BANK OF PORTAGE. } 5270. Error, Superior.

This day came defendant in error, by its counsel, and moved the court to extend the time to October 23rd, 1894, in which to file briefs; and the court, being fully advised in the premises, doth order that said motion be allowed.

And afterwards, on the 18th day of October, A. D. 1894, the following proceedings were had and entered of record in said cause, to wit:

46 CHEMICAL NATIONAL BANK *vs.* CITY BANK OF PORTAGE. } No. 5270. Error to Cook Superior.

This cause having this day been reached in the call of the docket and no one appearing to argue the same and the court, not being fully advised in the premises, doth order that said cause be taken under advisement in briefs filed and to be filed.

And afterwards, on the 12th day of November, A. D. 1894, the following proceedings were had and entered of record in said cause, to wit:

CHEMICAL NATIONAL BANK OF CHICAGO, ILLINOIS, Plaintiff in Error, *vs.* CITY BANK OF PORTAGE, WISCONSIN, Defendant in Error. } No. 5270. Error to Cook Superior.

On this day came again the said parties, and the court having diligently examined and inspected, as well the record and proceedings aforesaid as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, for that it appears to the court now here that neither in the record and proceedings aforesaid nor in the rendition of the judgment aforesaid *if* there anything erroneous, vivious, or defective, and that in that record there is no error, therefore it is considered by the court that the judgment aforesaid be affirmed in all things and stand in full force and effect, notwithstanding the said matters and things therein assigned for error; and it is further consid-
47 ered by the court that the said City Bank of Portage, Wisconsin, defendant in error, recover of and from the said Chemical National Bank of Chicago, Illinois, plaintiff in error, its costs by it in this behalf expended, to be taxed, and that it have execution therefor.

I, Thomas G. McElligott, clerk of the appellate court in and for the first district of the State of Illinois, do hereby certify that the foregoing is a true copy of the final order and judgment and all other proceedings of the said appellate court in the above-entitled cause of record in my office.

In testimony whereof I have set my hand and affixed the seal of the said appellate court, at Chicago, this 8th day of December, in the year of our Lord one thousand eight hundred and ninety-four.

THOMAS G. McELLIGOTT,
Clerk of the Appellate Court of the First Dist.

Supreme Court of Illinois, Central Grand Division, January Term, A. D. 1895.

THE CHEMICAL NATIONAL BANK OF CHICAGO, Plaintiff in Error, *vs.* CITY BANK OF PORTAGE, Defendant in Error.	Error to Appellate Court, First District.

And now comes the plaintiff in error, by its attorneys, and says that in the record and proceedings of the court below in the
48 above-entitled cause manifest error hath intervened to the prejudice of plaintiff in error in this:

First. The appellate court erred in affirming the judgment of the superior court.

Second. The appellate court erred in not reversing the judgment of the superior court.

Wherefore, for these and other errors apparent in the record, the plaintiff in error prays that the judgment of the appellate court may be reversed, &c.

DUNCAN & GILBERT,
Attorneys for Plaintiff in Error.

49 And be it remembered that afterwards, to wit, on the 5th day of January, A. D. 1895, an order was made by said court in words and figures following, to wit:

January Term, 1895.

JANUARY —, 189—.

CHEMICAL NATIONAL BANK *vs.* CITY BANK OF PORTAGE.	No. 51. Appeal from Appellate Court, First District.

On this day come the said parties, by their attorneys, and this being one of the days set apart for the call of the docket under the rules or orders of the court for this term, and this cause coming now on to be heard, the appellant having entered motion to reverse the judgment and remand said cause and for costs, and the appellee having entered motion to affirm the judgment herein and for costs and for *procedendo*, and said motions being taken under advisement for final hearing, and the clerk reporting to the court that said cause is now ready to be taken on the call of the docket, it is ordered by the court that this cause be now submitted upon the record, abstracts, briefs, and arguments filed and to be filed herein under the rules or order of the court; and it is further ordered by the court that this cause be now taken under advisement for final hearing.

And be it remembered that afterwards, to wit, on the second day of April, A. D. 1895, an opinion was filed in said court in words and figures following, to wit:

CHEMICAL NATIONAL BANK *vs.* CITY BANK OF PORTAGE. } Appeal from Appellate Court, First District.

50 CRAIG, *J.:*

This was an action of assumpsit, brought by the City Bank of Portage against the Chemical National Bank of Chicago. The declaration contained the common counts and one special count on the following promissory note:

$5,000. CHICAGO, ILL., *Feb'y 15th*, 1893.

Four months — days after date I promise to pay to the order of Theodore Wetmore five thousand dollars at Chemical National Bank of Chicago, value received, with interest at the rate of six per cent. per annum after due, having deposited with this note as collateral security certificate No. 477 for fifty shares stock of Chemical National Bank of Chicago, par value $100 per share, which said security or any part thereof I hereby give the legal owner or owners authority to sell on the maturity of this note or at any time thereafter or before, in the event of said security depreciating in value, at public or private sale at his discretion, without advertising the same or giving me any notice, and to apply so much of the proceeds thereof to the payment of this note as may be necessary to pay the same, with all interest due thereon, and also to the payment of all expenses attending the sale of said collateral security, and in case the proceeds of the sale of said collateral security shall not cover the principal, interest, and expenses I promise to pay the deficiency forthwith after such sale, with interest at six per cent per annum; and it is hereby agreed and understood that if recourse is had to said collateral any excess of collateral upon this note shall be applicable to any other note or claim held by said owner or owners against me, and in case of any exchange of or addition to the collateral above named the provisions of this note shall extend to such new or additional collateral.

C. E. BRADEN.

Endorsed: Without recourse. Theodore Wetmore.

51 It was averred in the declaration that on, to wit, the 15th day of February, A. D. 1893, the defendant, in the county of Cook, made its certain note in writing called a promissory note, and then and there delivered the said note to Theodore Wetmore, by which said note the said defendant, by the name, style, and description of C. E. Braden, promised to pay to the order of said Theodore Wetmore five thousand dollars four months after date at the Chemical National Bank of Chicago, with interest at six per cent. per annum, for value received.

To the declaration the defendant pleaded the general issue. The parties, by agreement, waived a jury, and a trial was had before the court, resulting in a judgment in favor of the plaintiff; this judg-

ment was affirmed in the appellate court, to reverse which the defendant sued out this writ of error.

On the trial the plaintiff, over the objection of the defendant, read in evidence the note described in the declaration. The plaintiff then called as a witness C. E. Braden, and, no objection whatever being made to his evidence, testified in substance that in 1893 he was cashier and J. O. Curry president of the Chemical National Bank; that he was familiar with the facts connected with the execution of the note of February 15, 1893, for $5,000; that in January or February of that year, in order to protect certain debts due to the bank, it took some of its stock from certain debtors. Hopkins, assistant cashier, had made a loan for the bank through certain brokers by giving his own note, payable on call, secured by some of the bank stock which the bank had taken in. After this note had run fifteen days the holder called the money. It was then agreed between Curry, the president, Braden, cashier, and Hopkins, assistant cashier, if Braden could place five or ten thousand
52 through a broker in Minneapolis it would be treated as a bank obligation and the bank would pay it, and it would have fifty or one hundred shares of the stock, as the case might be, transferred to Braden, to be used as collateral to secure the loan. Under this agreement Braden negotiated a loan of $5,000 through the broker, Wetmore. The note was signed by Braden, and fifty shares of bank stock was attached to it and sent to Wetmore, of Minneapolis, and he procured the money from City Bank of Portage, plaintiff, and it was paid over to the Chemical National bank.

Upon this evidence the circuit court rendered judgment against the Chemical National bank. It is, however, claimed in the argument that the plaintiff was not entitled to recover against the defendant, The Chemical National Bank, on the note executed by Braden. Whether a recovery could be had on the instrument set out in the declaration against the bank as an unnamed principal we shall not stop to inquire, as the case may properly be disposed of on other grounds. As before observed, the declaration contained the common counts, and if it was conceded, which it is not, that the defendant was not liable on the note, no reason is perceived why an action for money had and received could not be maintained. As was held in Laflin *v.* Howe, 112 Ill., 253., *indebitatus* for money had and received is an equitable action, and lies where one party has obtained money which in equity and good conscience he ought not to be permitted to retain. See also Barnes *v.* Johnson, 84 Ill., 95.

Here the Chemical National bank received from the plaintiff $5,000, which it agreed to pay. Braden, who signed the note, had no interest in the transaction. Wetmore had no interest. He acted merely as an agent in procuring the loan for the defendant and transferred the note over to the plaintiff without recourse, and
53 passed the money which the note represented from the plaintiff to the defendant. This money is still in the hands of the defendant. It is the person liable to pay the money and the City Bank of Portage is the person entitled to receive the money, and in

an action for money had and received we see no reason why the plaintiff may not surrender the note in court and recover judgment for the amount of the money.

It is, however, contended in the argument that a recovery cannot be had on the common counts for the reason that the money was borrowed in furtherance of a transaction which, if engaged in by defendant, would be illegal. The alleged illegality is that the stock pledged by Braden was not stock taken by the bank in satisfaction of a debt, but it was bought by the bank, and the note of Hopkins, assistant cashier, was given for the same; that this same stock was subsequently pledged by Braden for the loan obtained of the plaintiff.

Curry, president of the Chemical National bank, was called as a witness, and it may be inferred from his evidence, although he does not state the fact, that the bank stock procured by the bank was not taken in on a debt, but purchased. Conceding that the bank purchased fifty shares of its own stock, contrary to the provisions of the national banking act, does that unlawful act of the bank so pollute the transaction between plaintiff and defendant under which plaintiff loaned its money that the defendant may keep the money and the plaintiff bear the loss? If the facts were as claimed by counsel, they would not defeat a recovery on the part of plaintiff. The purchase of the stock and the loaning of the money from plaintiff were two distinct transactions; in the purchase of the stock the money used by the bank in payment was raised on the note of Hopkins, assistant cashier. Afterwards the bank paid the Hopkins note
54 with its own funds, and this ended the transaction so far as the purchase of stock was concerned. After this transaction was ended the bank applied to the plaintiff for a loan of money and obtained it, placing the bank stock previously obtained in the hand- of plaintiff as collateral.

The plaintiff did not know where, of whom, or in what manner the Chemical bank had acquired the bank stock turned over as collateral nor did it know what use the bank would make of the money loaned. Moreover this money was not loaned by plaintiff to pay for bank stock, and so far as appears it was never used for that purpose. So far as appears from the evidence there was nothing illegal in the transaction between plaintiff and defendant which resulted in the loan of five thousand dollars. Complaint is made that the court refused to hold certain propositions of law on behalf of defendant. These propositions all related to the right of recovery on the note set out in the special count of the declaration, and if plaintiff was entitled to recover under the common counts for money had and received, which we have endeavored to show *he* was, it is unimportant whether the court ruled correctly on the propositions or not.

The judgment of the appellate court will be affirmed.

Affirmed.

And be it remembered that on, to wit, the second day of April,

A. D. 1895, an order was made by said court in words and figures following, to wit:

CHEMICAL NATIONAL BANK *vs.* CITY BANK OF PORTAGE. } Appeal from Appellate Court, First District.

On this day come again the said parties, and the court
55 having diligently examined and inspected as well the record and proceedings aforesaid as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, for that it appears to the court now here that neither in the record and proceedings aforesaid nor in the rendition of the judgment aforesaid is there anything erroneous, vicious, or defective, and that the record is no error, herefore it is considered by the court that the motions heretofore made to reverse the judgment and remand said cause for a new trial *ne*, and the same are, denied and the motion heretofore made to affirm the judgment herein is allowed; and it is therefore ordered by the court that the judgment aforesaid be affirmed in all things and stand in full force and effect, notwithstanding the said matter and things therein assigned for error, and that motion for *procedendo* be allowed; and it is further considered by the court that the said appellee recover of and from the said appellant costs by it in this behalf expended, and that it have execution therefor.

56 And be it remembered that on, to wit, the 19th day of July, A. D. 1895, there was filed in said supreme court a petition for a writ of error; which said petition is in words and figures following, to wit:

Supreme Court of Illinois, Central Grand Division.

THE CHEMICAL NATIONAL BANK OF CHICAGO, Plaintiff in Error, *vs.* CITY BANK OF PORTAGE, Defendant in Error. } Appeal from Appellate Court, First District.

To the honorable the chief justice of the supreme court of Illinois:

Your petitioner, The Chemical National Bank of Chicago, a national banking association organized under the laws of the United States, respectfully represents unto your honor that a final judgment was entered in the above-entitled cause by the supreme court of the State of Illinois, sitting in and for the central grand division of said State, on or about the second day of April, A. D. 1895.

Your petitioner further represents that your petitioner in said cause claimed immunity from liability to the plaintiff in said cause in the trial court, being appellee in said supreme court, under section 5201 of the Revised Statutes of the United States, and that the decision of the superior court of Cook county, the trial court in said cause, the decision of the appellate court of the first district affirming

the judgment and decision of said superior court, and the
57 decision of said supreme court affirming said judgment and decision of said appelate court were against the immunity thus claimed by your petitioner.

Wherefore your petitioner prays that a writ of error may be allowed to have said record and proceedings reviewed by the Supreme Court of the United States, at Washington, in accordance with the statute in such case made and provided.

Respectfully submitted.

THE CHEMICAL NATIONAL BANK
OF CHICAGO,
By DUNCAN & GILBERT, *Its Attorneys.*

Upon examination of the foregoing petition it is ordered that the prayer of the petitioner is hereby allowed.

A. M. CRAIG,
Chief Justice.

Galesburg, Ill., July 19th, 1895.

And be it remembered that on, to wit, the 19th day of July, A. D. 1895, there was filed in said court a citation; which said citation is in words and figures as follows, to wit:

UNITED STATES OF AMERICA, }
Northern District of Illinois, } *ss:*

To City Bank of Portage, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October, A. D. 1895, pursuant to a writ of error, wherein you are defendant, filed in the clerk's office of the supreme court of Illinois for the central grand division, and
58 wherein The Chemical National Bank of Chicago is plaintiff, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. A. M. Craig, chief justice of the supreme court of Illinois, this 20th day of July, in the year of our Lord one thousand eight hundred and ninety-five.

A. M. CRAIG,
Chief Justice.

Said citation was endorsed as follows:

Supreme Court of the United States. The Chemical National Bank of Chicago, plaintiff in error, *vs.* City Bank of Portage, defendant in error. Citation to October term, 1895.

Service of the within citation is accepted this 22nd day of July, A. D. 1895.

D. K. TENNEY,
TENNEY, McCONNELL & COFFEEN,
Attorneys for Defendant in Error.

And be it further remembered that on, to wit, the 20th day of July, A. D. 1895, there was filed in said court a bond; which said bond is in words and figures following, to wit:

59 Know all men by these presents that we, The Chemical National Bank of Chicago, by E. C. Tourtelot, its receiver, as principal, and Hiram T. Gilbert, as surety, of the county of Cook and State of Illinois, are held and firmly bound unto City Bank of Portage, of the State of Wisconsin, in the penal sum of one thousand dollars, lawful money of the United States; for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly, severally, and firmly by these presents.

Witness our hands and seals this 20th day of July, A. D. 1895.

The condition of the above obligation is such that whereas the said City Bank of Portage did on the 7th day of March, A. D. 1894, in the superior court of Cook county, recover a judgment against said The Chemical National Bank of Chicago for the sum of five thousand two hundred twenty-six dollars and sixty-*s*iven cents ($5,226.67) and costs of suit; and

Whereas the appellate court of the first district of Illinois did on the 12th day of November, A. D. 1894, enter a judgment affirming said judgment of said superior court of Cook county, and did render judgment against the above-bounden The Chemical National Bank of Chicago for costs of suit; and

Whereas the supreme court of the State of Illinois, sitting in and for the central grand division, did on the 2nd day of April, A. D. 1895, enter a judgment affirming said judgment of said appellate court of the first district of Illinois, and did render judgment against the above-bounden The Chemical National Bank of Chicago for costs of suit; and

60 Whereas said The Chemical National Bank of Chicago has obtained a writ of error from the Supreme Court of the United States to said supreme court of Illinois to reverse the judgment in the aforesaid suit, and a citation directed to said City Bank of Portage, citing and admonishing it to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next:

Now, the condition of the above obligation is such that if the said The Chemical National Bank of Chicago shall prosecute its said writ of error to effect and pay the costs that may be rendered against it if it shall fail to make its plea good, then the above obligation to be void; otherwise to remain in full force and effect.

THE CHEMICAL NATIONAL BANK
OF CHICAGO,
By E. C. TOURTELOT, *Its Receiver.* [SEAL.]
HIRAM T. GILBERT. [SEAL.]

Approved July 20th, 1895, by me—
A. M. CRAIG, *C. J.*

61 I, E. A. Snively, clerk of the supreme court in and for the central grand division, State of Illinois, do hereby certify that the foregoing is a complete, true, and correct copy of the record of the superior court of Cook county, Illinois; the record of the appellate court of the first district, State of Illinois; the proceedings in the supreme court of the State of Illinois, petition for writ of error, citation, and bond in a certain suit wherein The Chemical National Bank was appellant and The City Bank of Portage was appellee as the same appears of record and the files of my office.

Seal of the Supreme Court State of Illinois.

In testimony whereof I hereunto set my hand and affix the seal of said supreme court, at Springfield, this first day of August, A. D. 1895.

E. A. SNIVELY,
Clerk Supreme Court.

62 UNITED STATES OF AMERICA, *Northern District of Illinois,* } ss:

The United States of America to the judges of the supreme court of the State of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is before you in said court, between The Chemical National Bank of Chicago and City Bank of Portage, a manifest error hath happened, to the great damage of the said The Chemical National Bank of Chicago, as by its complaint appears, and it being fit that the error, if any there has been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. 1895, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Seal of Circuit Court U. S., Northern Dist. Illinois, 1855.

Witness the Hon. Melville W. Fuller, Chief Justice of the United States, this 20th day of July, in the year of our Lord one thousand eight hundred and ninety-five, and of the Independence of the United States the one hundred — twentieth year.

S. W. BURNHAM,
Clerk U. S. Circuit Court, Nor. Dist. Ill.

63 [Endorsed:] Supreme Court of the United States. The Chemical National Bank of Chicago, plaintiff in error, *vs.* City Bank of Portage, defendant in error. Writ of error.

STATE OF ILLINOIS, *ss:*

Supreme Court.

In obedience to this writ of error I herewith return a full, true, and correct copy — the record of the superior court of Cook county, Illinois; the record of the appellate court, first district Illinois; the proceedings in the supreme court of the State of Illinois, petition for writ of error, citation, and bond as the same *as* appears of record and the files in the office of the clerk of the supreme court, as I am commanded to do.

Seal of the Supreme Court, State of Illinois.

Witness my hand and seal of said supreme court, at Springfield, Illinois, this first day of August, A. D. 1895.

E. A. SNIVELY,
Clerk Supreme Court.

64 Supreme Court of the United States, October Term, A. D. 1895.

THE CHEMICAL NATIONAL BANK OF CHICAGO, Plaintiff in Error,
v.
CITY BANK OF PORTAGE, Defendant in Error.
} Error to Supreme Court of Illinois.

And now comes the plaintiff in error, by Hiram T. Gilbert, its attorney, and says that in the record and proceedings of the supreme court of Illinois in the above-entitled cause manifest error hath intervened to the prejudice of said plaintiff in error, in this:

First. The supreme court of Illinois erred in affirming the judgment of the appellate court of the first district.

Second. The supreme court of Illinois erred in not reversing the judgments of the appellate court of the first district and of the superior court of Cook county.

Third. The supreme court of Illinois erred in holding and deciding that it was unimportant whether the trial court ruled correctly upon the propositions of law requested by plaintiff in error at the trial and refused by the trial court.

Fourth. The supreme court of Illinois erred in not holding that the superior court of Cook county erred in refusing to hold as law applicable to the decision of the case propositions numbered 1, 2, 3, 4, 6, and 8 and each of them, requested by the plaintiff in error, and in not holding that for such error the judgments of the appellate court of the first district and of said superior court of Cook county should be reversed.

Wherefore, for these and other errors apparent in the record, the plaintiff in error prays that the judgment of the supreme court of Illinois may be reversed, &c.

HIRAM T. GILBERT,
Attorney for Plaintiff in Error.

Endorsed on cover: Case No. 16,026. Illinois supreme court. Term No., 736. The Chemical National Bank of Chicago, plaintiff in error, *vs.* City Bank of Portage. Filed September 21st, 1895.

JAN 2 1896
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1895.

No. 736.

CHEMICAL NATIONAL BANK OF CHICAGO,
Plaintiff in Error,
vs.
CITY BANK OF PORTAGE,
Defendant in Error.

Error to Supreme Court of Illinois.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

HIRAM T. GILBERT,
FOR PLAINTIFF IN ERROR.

BARNARD & MILLER, PRINT., CHICAGO.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1895.

CHEMICAL NATIONAL BANK OF CHICAGO,
Plaintiff in Error,
vs.
CITY BANK OF PORTAGE,
Defendant in Error.

Error to the Supreme Court of Illinois.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

MAY IT PLEASE THE COURT:

This case presents the question whether a national bank is liable to the lender for money borrowed by its cashier in his individual name under the following circumstances:

The president of a national bank, at the request of some of its directors, caused to be purchased at the Stock Exchange, through a broker, fifty shares of the bank's capital stock, and the assistant cashier of the bank gave his individual note, payable on demand, and secured by the fifty shares of stock as collateral, for the purchase price. Payment of this note being demanded, it was agreed between the president of the bank and the cashier that the latter should pay the note out of the moneys of

the bank, and should, for the purpose of replacing the money thus paid out, borrow money upon his own individual note secured by the fifty shares of stock as collateral, and that this note should be treated as an obligation of the bank. In accordance with this understanding the note of the assistant cashier was paid out of the bank's money, and this money was replaced by the proceeds of the discount of the cashier's individual note, secured by the fifty shares of stock as collateral. The party who discounted the note relied solely upon the individual liability of the cashier, and had no knowledge at the time the note was so discounted of the arrangement by which it was proposed to treat the note as a bank obligation. The bank, through its governing body, never authorized or ratified either the purchase of the stock or the borrowing of the money; nor did the stock ever stand in the name of the bank.

By its affirmance of the judgments of the trial and Appellate courts the Supreme Court of Illinois held, in effect, that, assuming the facts to be substantially as above stated, the lender could recover from the bank the money thus borrowed.

The action was assumpsit brought in the Superior Court of Cook County, Illinois, by City Bank of Portage against the Chemical National Bank of Chicago, which, before the commencement of the suit, had become insolvent, and whose assets had been placed in the hands of a receiver appointed be the comptroller of the currency. (Rec., 5, 11.) The declaration consisted of the common counts and a special count upon a promissory note in the words and figures following:

"$5,000. CHICAGO, Ill., February 15, 1893.

"Four months after date I promise to pay to the order of Theodore Wetmore, Five Thousand Dollars, at "Chemical National Bank of Chicago, value received, "with interest at the rate of six per cent. per annum "after due, having deposited with this note, as collateral "security, certificate No. 477 for fifty shares stock of "Chemical National Bank of Chicago, par value $100 "per share, which said security, or any part thereof, I "hereby give the legal owner, or owners, authority to "sell on the maturity of this note, or at any time thereafter or before, in the event of said security depreciating in value, at public or private sale, at his discretion, "without advertising the same, or giving me any notice, "and to apply so much of the proceeds thereof to the "payment of this note as may be necessary to pay the "same, with all interest due thereon; and also to the "payment of all expenses attending the sale of said collateral security, and in case the proceeds of the sale of "said collateral security shall not cover the principal, interest and expenses, I promise to pay the deficiency "forthwith after such sale, with interest at six per cent. "per annum. And it is hereby agreed and understood, "that if recourse is had to said collateral, any excess of "collateral upon this note shall be applicable to any "other note or claim held by said owner or owners "against me, and in case of any exchange of, or addition "to the collateral above named, the provisions of this "note shall extend to such new or additional collateral.

"C. E. BRADEN."

(Endorsed): "Without recourse,"

THEODORE WETMORE.

The defendant pleaded the general issue, and by agreement of the parties the cause was submitted to the court for trial without a jury. Upon the trial the plaintiff introduced as a witness Charles E. Braden, whose testimony on *direct* examination (Rec., 15–18), when construed most favorably for the plaintiff, tended to prove the following facts:

In 1893 Braden was cashier, J. O. Curry was president, and George E. Hopkins was assistant cashier of the Chemical National Bank of Chicago. In January or February of that year in order to protect certain debts due to the bank it was necessary for it to take in some of its stock from certain debtors. Hopkins had given to a firm of brokers his own note payable on call, secured by some of the bank stock which the bank had taken in. After this note had run fifteen days the holders called the money, and it was paid out of the moneys of the bank. It was then agreed between Curry, Braden and Hopkins that if Braden could place $5,000 or $10,000 through a broker in Minneapolis it would be treated as a bank obligation, and the bank would pay it, and it would have fifty or one hundred shares of the stock, as the case might be, transferred to Braden to be used as collateral to secure the loan. Under this agreement Braden negotiated a loan of $5,000 through one Wetmore, a broker. The note was signed by Braden, and a certificate for fifty shares of bank stock was attached to it and sent to Wetmore at Minneapolis, and he procured the money from the City Bank of Portage, the plaintiff, and it was paid over to the Chemical National Bank.

Upon *cross*-examination, however, Braden testified, in substance (Rec., 18–24), that all he had stated upon his direct examination with respect to what had occurred

down to the time payment of the Hopkins note was demanded was mere hearsay; that the witness (*i. e.* Curry), who would be called by the defendant, would be able to tell more about it, and that all he, Braden, knew about the transaction was that the Hopkins note was called, that the money to pay it was taken out of the bank, and that the money borrowed upon his, Braden's, note was used to re-place the money so taken out. He further testified that, although some of the directors knew of the transaction, the board of directors did not authorize it at a board of directors' meeting. Rejecting that portion of his testimony which he admitted was mere hearsay, there was nothing left in it to justify the inference that the bank stock which secured the Hopkins note, and which was subsequently used to secure the Braden note, was stock which the bank had taken in to protect debts due to it.

This testimony of Braden, together with the note mentioned in the declaration, and the certificate for the fifty shares of stock, being all the evidence introduced by the plaintiff, the defendant introduced as a witness J. O. Curry, the president of the bank, whose testimony (Rec., 26–31), tended to prove the following facts:

Some of the directors of the Chemical National Bank instructed Curry to buy any amount of the capital stock of the bank up to $100,000, that might be offered for sale at par, and stated to him that they would take it individually at different times as their money might come in. In consequence of this instruction a broker acting upon the order of Curry, purchased on the Stock Exchange fifty shares of stock, and Hopkins, the assistant cashier, gave his individual demand note secured by the fifty shares of stock as collateral for the purchase price.

Subsequently, payment of this note was demanded by the broker, and thereupon the cashier's check was given him for the amount, and the money was paid out of the funds of the Chemical National Bank. In order to replace the money used to pay the Hopkins note, it was arranged between Curry, Braden and Hopkins that Braden should execute his individual note to a broker, attach to it the certificate for fifty shares of stock which for that purpose had been transferred to him, get the note discounted and turn the proceeds over to the bank. This was accordingly done. The note described in the declaration was executed to Wetmore, a broker; the fifty shares of stock were attached to it as collateral, and he procured it to be discounted by the plaintiff and the proceeds were turned over to the defendant.

There was no proof tending to show that at the time it discounted this note the plaintiff supposed it to be the note of defendant, or to rebut the presumption arising from the note itself, that the plaintiff made the loan solely upon the faith of the individual liability of Braden, and upon the security of the stock attached to the note as collateral.

This being all the evidence introduced in the case, the defendant contended that a recovery by the plaintiff was prohibited by Section 5201 of the Revised Statutes of the United States which is as follows:

"No association shall make any loan or discount on "the security of the shares of its own capital stock, nor "be the purchaser or holder of any such shares, unless "such security or purchase shall be necessary to prevent "loss upon a debt previously contracted in good faith; "and stock so purchased or acquired shall, within six "months from the time of its purchase, be sold or dis-

" posed of at public or private sale; or, in default there-
" of, a receiver may he appointed to close up the busi-
" ness of the association according to Section fifty-two
" hundred and thirty-four."

The claim of the defendant was that the transaction proven was, in substance, a borrowing of money for the purpose of purchasing shares of the bank's stock or of making payment for shares of the bank's stock already purchased; that it was in form a borrowing by the cashier individually; that it was not authorized or ratified by the governing body of the bank; that the cashier had in no event any implied authority to borrow money in the name of the bank, but, even if he had, that, as the purchase of the stock, if made for the bank itself, would have been an illegal transaction, there was no implied power in the cashier to borrow money for the bank for such purpose, and that, as the plaintiff had not given the bank credit or loaned its money upon the faith of the bank's liability, it could not recover of the bank, but must look for repayment to Braden, to whom and upon whose individual liability alone the loan was made.

For the purpose of availing itself of the benefit of this defense the defendant, in accordance with the practice prescribed by the statutes of Illinois, presented to the trial court (Rec., 31–40) and asked the trial court to hold as law applicable to the decision of the case the following, among other, propositions:

" 1. If the court finds from the evidence that some
" of the directors of the Chemical National Bank of Chi-
" cago were desirous of purchasing shares of the capital
" stock of said bank for themselves, individually; that
" in pursuance of such desire they instructed the presi-
" dent of said bank to purchase such an amount of said

" shares of stock not exceeding $100,000 par value, as " might be offered at par, stating to him that they would " take the stock so purchased at different times as their " money came in; that in pursuance of such instruction " the president of said bank caused a broker to purchase " fifty shares of said capital stock, and in payment for said " stock one Hopkins, assistant cashier of said bank, gave " to said broker his individual note for the purchase " price of said stock, payable on demand; that there- " after, payment of said note being demanded of said " Hopkins, the president and cashier of said bank paid " said note out of the moneys of said bank, and there- " upon it was arranged by and between the president, " the cashier, and the assistant cashier, that the cashier, " Braden, should execute his individual note for $5,000 " to a broker; that fifty shares of said stock so purchased " should be transferred upon the books of the bank to " said Braden, and attached to said note to be given to " said broker as collateral security; that said broker " should procure said note to be discounted, and that the " money realized by discounting said note should be " paid into the moneys of the bank to replace the money " of the bank used in paying the Hopkins note, and that " in pursuance of such arrangement said Braden gave the " note in controversy, and the same was discounted and " the proceeds were deposited with the moneys of the " Chemical National Bank of Chicago, then the court " should find that said note was the individual note of " said Braden, and not the note of the defendant, and " should find the issues in favor of the defendant."

" 2. If the court believes the testimony given by J. " O. Curry in this case to be true and to be a correct " statement of the circumstances connected with the

" execution by Braden of the note sued on, then the " court must find the issues joined in favor of the de- " fendant."

" 3. Although the court may believe the testimony of " Braden to be true, yet his testimony, with all infer- " ences that may be justifiably drawn therefrom in favor " of the plaintiff, does not justify a finding in favor of " the plaintiff."

" 6. The purchase by officers of a National Banking " Association of shares of its own capital stock, unless " such purchase is necessary to prevent loss upon a debt " previously contracted in good faith, cannot be regarded " as a transaction of the association itself unless express- " ly authorized by its board of directors, and a note exe- " cuted by an officer in his own individual name for the " purpose of borrowing money to make such a purchase " cannot be regarded as the note of the association un- " less recognized as such by its board of directors, and " unless the lender parted with his money upon the faith " of the liability of the association."

" 8. Although a corporation may be held liable upon " a contract that is *ultra vires*, or prohibited by law " when such contract has been fully executed by the " other party, yet where such contract has been entered " into by an officer of the corporation in his own individ- " ual name, and the other party, at the time he per- " formed the same on his part, had no knowledge that " the same was for the benefit of the corporation, and " did not part with any money or property on the faith " of the liability of the corporation upon the contract, " but on the contrary executed the contract on his part " in reliance solely upon the individual liability of such " officer, such other party cannot enforce such contract " against the corporation as an undisclosed principal."

But the trial court refused to hold either of these propositions as law applicable to the decision of the case, to which ruling the defendant duly excepted. Judgment having been rendered in favor of the plaintiff for the amount due upon the note, the cause was removed by writ of error to the Appellate Court of the First District, which affirmed the judgment. Thereupon the cause was removed by writ of error to the Supreme Court of Illinois, which affirmed the judgment of the Appellate court. The opinion of the Supreme Court will be found in 156 Ill., 149, and on pages 50-54 of this record. The present writ of error is brought to secure a review of the judgment of the Supreme Court of Illinois. The errors assigned are, that the Supreme Court of Illinois erred in affirming and not reversing the judgments of the Appellate and Superior courts, and in not holding that the Superior Court erred in refusing to hold as law applicable to the decision of the case propositions numbered 1, 2, 3, 4, 6 and 8, and each of them, requested by plaintiff in error, and in not holding that for such error the judgments of the Appellate and Superior courts should be reversed.

BRIEF.

I.

The court erred in refusing to hold as law applicable to the decision of the case propositions one, two, three, six and eight and each of them.

The first and second propositions are based upon the testimony of Curry, and under the facts shown by his testimony plaintiff cannot recover.

The cashier of a national bank has no implied power to borrow money in the name of the bank.

Western Nat. Bk. v. *Armstrong*, 346.

There was here no express authority for the borrowing of the money.

Neither was the defendant bound because of its receipt of the money. It received no actual benefit, for the money borrowed by Braden merely replaced that unlawfully appropriated by Braden for the purpose of paying the Hopkins note given for the stock.

The third proposition assumes as true the testimony of Braden. Rejecting that portion of it which he admitted was hearsay, it does not show any liability on the part of the defendant.

The sixth proposition, in effect, asserts the principle that the officers of a national bank have no implied authority to violate Section 5201 of the Revised Statutes in the name of the bank without at least being authorized so to do by the board of directors, and, therefore, merely states a rule that is self-evidently correct, and the court should have held it as law in the case.

The eighth proposition states a correct rule of law applicable to the case. It is that one who deals with an individual as such, and supposing him alone to be liable, will not be permitted to show the contract was for the benefit of a corporation if it was one which, as to the corporation was *ultra vires*, or, in other words, a corporation is only to be held liable under an *ultra vires* contract when the other party was induced to part with its money on the faith of such liability.

Here the plaintiff did not deal with the defendant nor suppose it was dealing with Braden as defendant's agent and so no injustice can be done the plaintiff by compelling it to resort to Braden for the return of the money loaned.

II.

If the trial court erred in holding as law applicable to the decision of the case either one of propositions one, two, three, six and eight, the judgment of the Supreme Court of Illinois should be reversed.

There is a federal question involved, which is either *first*, whether a cashier of a national bank has implied power to borrow money in its name, or *second*, whether the purchase of the stock was one which, in law, could be regarded as one of the defendant's.

The decision of the Supreme Court was not based upon an independent ground not involving a federal question, but the decision of the federal question was decisive of the case.

Whatever expressions of opinion as to the facts the Supreme Court may have made are to be disregarded for the reason that it had no lawful power to pass upon any

questions of fact, but it was its duty to reverse the judgment if it found that the propositions were correct and based upon the evidence.

R. S. Illinois, 1874, Ch. 110, Sec., 41.
Cook v. *Thayer*, 11 Ill., 617.
French v. *Lowry*, 19 Ill., 158.
Field v. *C. & R. I. R. R. Co.*, 71 Ill., 458.
Sexton v. *Chicago*, 107 Ill., 323.
Cothran v. *Ellis*, 107 Ill., 413.
R. S. Illinois, 1874, Ch. 110, Sec. 88.

Besides, the views expressed by the Supreme Court are so manifestly erroneous and unwarranted that its opinion is entitled to no weight or consideration from this court.

ARGUMENT.

I.

THE COURT ERRED IN REFUSING TO HOLD AS LAW APPLICABLE TO THE DECISION OF THE CASE PROPOSITIONS ONE, TWO, THREE, SIX AND EIGHT AND EACH OF THEM.

By proposition one (Rec., 31 to 33), it will be observed, the facts are assumed to be substantially as testified to by Curry, the proposition being a recital of his testimony in substance and legal effect. By proposition two (Rec., 33) every fact testified to by him is assumed to be true. As it is manifestly unnecessary to trouble the court with a separate discussion of each of these propositions we shall content ourselves with a consideration of the second, which we have already seen is as follows:

" 2. If the court believes the testimony given by J. O. " Curry in this case to be true and to be a correct state- " ment of the circumstances connected with the execu- " tion by Braden of the note sued on, then the court " must find the issues joined in favor of the defendant."

Taking the testimony of Curry to be true and assuming as true, and thus giving the plaintiff the benefit of that portion of the testimony of Braden that is not inconsistent with the testimony of Curry, it appears that the circumstances under which the note sued on was executed by Braden, so far as they can be regarded as material, were, in substance and legal effect, the following:

1. Some of the directors of the Chemical National Bank instructed its president to buy any amount of the capital stock of the bank up to $100,000 that might be offered for sale at par and stated to him that they would take it individually at different times as their money might come in. (Rec., 26).

2. In consequence of this instruction a broker, acting upon the order of the president of the bank, purchased on the stock exchange fifty shares of its stock (Rec., 28), and the assistant cashier gave his individual demand note secured by the fifty shares of stock as collateral for the purchase price. (Rec., 26).

3. Subsequently payment of this note was demanded by the broker and thereupon the cashier's check was given him for the amount and the money was paid out the funds of the Chemical National Bank. (Rec., 26–27).

4. In order to replace the money used to repay the Hopkins note, it was arranged between Curry, Braden and Hopkins that Braden should execute his individual note to a broker, attach to it the certificate of fifty shares

of stock which for that purpose had been transferred to him, get the money discounted and turn the proceeds over to the bank, which was done accordingly. (Rec., 21, 23).

5. The note described in the declaration was executed to Wetmore, a broker, the fifty shares of stock were attached to it as collateral and he procured it to be discounted by the plaintiff and the proceeds were turned over to the defendant. (Rec., 23).

6. Although some of the directors knew of the transaction, the board of directors did not authorize it at a board of directors meeting. (Rec., 23).

7. At the time it discounted this note the plaintiff supposed it to be the note of Braden and made the loan solely upon the faith of the individual liability of Braden, and upon the security of the stock attached to the note as collateral.

The last fact though not established by direct evidence follows as a necessary consequence from the entire absence of proof tending to show that the plaintiff, when it discounted the note, understood it to be other than the individual note of Braden. Indeed the trial court, at the request of the defendant (Rec., 38), endorsed its approval in the manner provided by statute, upon the following proposition:

"There is no evidence in this case legally sufficient to "justify a finding that the plaintiff, at the time it accepted "the note in controversy and advanced money on the "same, had any knowledge whatever that Braden was not "the real principal, or that it advanced any money on the "note upon the faith of any supposed liability of the de- "fendant upon said note."

The question presented is, therefore, whether under

the facts above stated the defendant could properly be held liable to the plaintiff. If so, the judgment of the Supreme Court of Illinois was right and should be affirmed, but if not, it was wrong and should be reversed.

That the laws of the United States do not confer upon the cashier of a national banking association organized there under any implied power to bind the association by a borrowing of money in its name or on its behalf, is settled by *Western National Bank* v. *Armstrong*, 152 U. S., 346, in which Mr. Justice SHIRAS in delivering the opinion of the court, among other things, says:

"The power to borrow money or to give notes is not "expressly given by the act. The business of the bank "is to lend, not to borrow, money; to discount the notes "of others, not to get its own notes discounted. Still, "as was said by this court, in the case of *First Nat.* "*Bank of Charlotte* v. *National Exch. Bank of Balti-* "*more*, 92 U. S., 127 (23:681), 'authority is given in "the act to transact such a banking business as is speci- "fied, and all the incidental powers necessary to carry it "on are granted. These powers are such as are re- "quired to meet all the legitimate demands of the au- "thorized business, and to enable a bank to conduct its "affairs, within the scope of its charter, safely and pru- "dently. This necessarily implies the right of a bank "to incur liabilities in the regular course of its business, "as well as to become the creditor of others.'

"Nor do we doubt that a bank, in certain circum- "stances, may become a temporary borrower of money. "Yet such a transaction would be so much out of the "course of ordinary and legitimate banking as to require "those making the loan to see to it that the officer or "agent acting for the bank had special authority to bor- "row money.

"Even, therefore, if it be conceded that it was within "the power of the board of directors of the Fidelity Na- "tional Bank to borrow $200,000 on time, it is yet obvi- "ous that the vice-president, however general his pow- "ers, could not exercise such a power unless specially "authorized so to do, and it is equally obvious that per- "sons dealing with the bank are presumed to know the "extent of the general powers of the officers."

The law being as stated in this opinion, it follows that in order to fasten a liability upon the defendant for the loan procured by its cashier, Braden, through the discount of his individual note, it must appear either, *first*, that the defendant through its governing body, *i. e.*, its board of directors, expressly authorized him to borrow money in its behalf, or, *second*, that after the loan was procured the defendant, through its governing body, ratified it by treating it as a corporate transaction and accepting the proceeds thereof.

1. *Did the defendant through its governing body expressly authorize Braden to borrow the money in its behalf?*

It cannot be pretended that in the facts above detailed, there can be found any basis for a claim that the board of directors of the defendant expressly authorized Braden to borrow money of the plaintiff or of any one else. It is true the president of the bank arranged with him to do so, but the president of a bank, whether it be a national or state bank, has himself no implied authority to borrow money, and make the bank liable therefor. This principle is so well settled that even counsel for the plaintiff will not dispute it. As therefore the president of the bank had himself no implied power to borrow money in the name of the defendant, he could not con-

fer such power upon the cashier, unless the board of directors had expressly authorized him so to do.

But the facts supposed contain nothing whatever to justify the assumption that the board of directors ever gave Curry, the president, power to authorize Braden to borrow money in its behalf. It is true some of the directors, being desirous individually of obtaining some of the bank's stock, instructed Curry to buy whatever might be offered for sale at par, but this manifestly was not an instruction to buy the stock in the name or on behalf of the defendant, nor was it an instruction given by the board of directors, which alone could confer the power to borrow money. Furthermore, such an order, even if given, would have been in violation of Section 5201 of the Revised Statutes, and therefore would have conferred no authority upon the president of the bank to bind it in respect to such a transaction.

It is clear, therefore, that under the facts supposed in the proposition under consideration, there is nothing sufficient to establish express authority in Braden to borrow money in behalf of the bank. Indeed, even if all the testimony of Braden were taken as absolutely true, there could be no pretense that it in any manner tended to show express authority given him by the board of directors to borrow money on behalf of the bank.

2. *Did the defendant, through its governing body, after the loan was procured, ratify it by treating it as a corporate transaction, and accepting the proceeds thereof?*

That the proceeds of the discount of Braden's note were deposited among the moneys of the defendant is not disputed, but on the contrary is conceded by the facts supposed in the proposition. On behalf of the defend-

ant, however, it is insisted that this fact under the circumstances supposed in the proposition, does not make it liable.

If in the case at bar there were nothing to be considered aside from the borrowing of the money, it might with some force be urged that as it here appears the bank did actually receive the money, it should be held liable to the plaintiff, because of its having been benefited to the extent of the money which it received, or in other words, that by appropriating to its own use the proceeds of the loan made by its officer, it made the loan its own loan, and became liable for repayment to the lender. Here, however, when the entire transaction is considered, it will appear that the bank never received any benefit from it.

That the bank had no interest in the original purchase of the fifty shares of stock made by a broker on the stock exchange by Curry's direction is evident. The purchase of the stock by the bank itself would have been in violation of Section 5201 of the Revised Statutes and therefore illegal. For this reason the purchase was expressly made the individual transaction of Hopkins, the assistant cashier, who gave his individual note for the purchase price secured by the stock as collateral. To hold that down to this point the bank was in any manner a party to the transaction is therefore inadmissible. It had never authorized the purchase, had no lawful power to authorize it, nor had the purchase been made in its name, and it was no more a party to it than it would have been to any other individual transaction of one of its officers.

Nor did it become a party to the transaction subsequently. It is true that when Hopkins, the assistant cashier, was called upon to pay his note, Braden, the

cashier, with the assent of Curry, the president, paid the money out of the funds of the bank, and put the fifty shares of stock in the cash drawer as a cash item to temporarily take the place of the money thus used to pay the Hopkins note. This, however, did not make the bank a party to the transaction. The board of directors were not consulted with reference thereto, and did not authorize the course pursued by the cashier.

It would be a most dangerous rule to hold, that if an employe without authority, and indeed in violation of law, used his employer's money in the purchase of property, the employer, without his knowledge or consent, would thereby become a party to the transaction. Yet such rule would be necessarily applied in the case at bar, were the defendant treated in law as the purchaser of the stock simply because its cashier and president had used its money in making the purchase.

It is therefore plain that down to the time when the Hopkins note had been paid, and the question of procuring a discount of Braden's note arose, the bank had not become a party to the transaction. Its position was solely that of a corporation whose money had been unlawfully appropriated by its officers, without its knowledge, consent or approval and under circumstances which would have rendered it unlawful to have given such consent or approval.

Did it therefore become a party to the transaction and consequently liable to the plaintiff by reason of the borrowing by Braden, and its receipt of the proceeds of Braden's note? This question, it seems to us, is easily answered.

The note made by Braden was in form his individual

note, and was understood to be his individual note by the plaintiff. There is no pretense it was made by express authority from the board of directors of the defendant. If binding upon the defendant, therefore, it is solely because the defendant received the money which the plaintiff advanced in consideration of the note.

But the mere receipt of the proceeds of a note by a person not the maker can not in and of itself alone make such person liable. The transaction must have been one for his benefit and not for the benefit of another.

Thus, if the cashier of a bank, acting in concert with its president, should embezzle its moneys and squander them in speculation and then for the purpose of replacing them should borrow money in his individual name and upon his individual credit and not in the name or upon the credit of the bank, it could not well be held that the bank would be liable upon the note or otherwise liable as an undisclosed principal, unless it could also be held that any creditor who received his pay by means of money borrowed by his debtor from a third person, can thereby be made liable to such third person for the money so borrowed.

In the case at bar, assuming the facts supposed in the proposition to be true, the act of the cashier in using the bank's money was wrong and was known to be so by all the parties concerned. The president, cashier and assistant cashier all knew the bank was prohibited by law from purchasing its own stock, excepting to prevent loss upon a debt previously contracted in good faith, and the purchase of the fifty shares of stock was made an individual transaction of Hopkins, the assistant cashier, for the very purpose of preventing its being a transaction of the bank itself, and thereby subjecting the bank to the

criticism of the bank examiner, and perhaps the forfeiture of its franchise. Therefore, having illegally used the bank's money to pay the Hopkins note, it was the cashier's duty to replace the money thus illegally used, just as it would have been his duty to pay a debt which he had contracted individually, and the fact that the bank received payment of the money so illegally used can not, of itself alone, make it liable to the plaintiff, who loaned, not to the bank, but to the cashier individually.

The difficulty with the plaintiff's position is that, in order to maintain it, it must show that to have been a transaction of the bank itself, which was had by the cashier of the bank in his individual name for the very purpose of preventing its being a transaction of the bank. If the purchase of the stock was a bank transaction why was it not made in the bank's name and upon the bank's credit, and if the loan made from the plaintiff was a bank transaction why was not it also made in the bank's name and upon the bank's credit? The only answer to this is that the purchase of the stock, if made by the bank itself, would have been illegal, and the purchase was made an individual transaction to prevent the bank from doing that which would have been illegal. All the parties concerned, for the purpose of avoiding a violation of the law, elected to make the transaction one of the cashier as an individual and not one of the bank.

There is another test, which, if applied to the plaintiff's claim, is fatal to its right of recovery. The case made by the facts supposed by the proposition and shown by the proof, is one by which the plaintiff seeks to hold the defendant liable as an undisclosed principal. The plaintiff, it is conceded, did not deal with the defendant and did not suppose nor was it in any manner led to be-

lieve that it was dealing with the defendant, but it did suppose and believe that it was dealing with Braden individually. Consequently the plaintiff can not recover from the defendant, unless it can establish an authority on the part of Braden to act for the defendant that Braden himself could avail of in a suit between himself and the defendant. In other words, the plaintiff in this case cannot recover from the defendant unless Braden himself, had he paid the note held by the plaintiff, could have compelled the defendant to reimburse him for the moneys thus paid out.

But it is too plain for argument that if Braden had paid this note he could not, under the facts supposed, recover of the defendant the money thus paid out, for it would have been a sufficient answer on the part of the defendant to a claim on the part of Braden to a right to recover, that the transaction relating to the purchase of the stock was not expressly authorized by the board of directors, and being a transaction which the law prohibited the defendant from entering into, there was no authority on his part to enter into it for the benefit of the bank. Indeed, even had the board of directors expressly authorized Curry and Braden to buy this stock and borrow the money to pay for it, and it had been understood that, for the purpose of concealing the transaction from the officers of the government, it should be carried on in the individual names of the officers of the bank, instead of in the name of the bank, and Braden, after giving his note had paid it and brought suit to recover the amount from the bank, no court would permit him to recover. He would have been denied relief because a party to an illegal act, and therefore *in pari delicto* with the defendant.

We respectfully submit that the facts testified to by

Curry and supposed in the proposition now under consideration, show a case where the defendant cannot be held liable without a disregard of the plain provisions of Section 5,201 of the Revised Statutes, prohibiting the purchase by a national bank of shares of its own stock, when such purchase is not necessary to prevent loss upon a debt previously contracted in good faith. To hold that the defendant is liable to the plaintiff is impossible without at the same time holding that the defendant did purchase shares of its own stock in violation of the plain prohibition contained in the statute. Furthermore, to hold that the defendant did purchase the stock is to hold that its president and cashier, without authority from its board of directors, had the implied power to purchase the stock for its benefit, or, in other words, to hold that the president and cashier had the implied power to violate, in the name of the defendant, the prohibition contained in the statute and bind the defendant thereby.

The third proposition offered on behalf of the defendant (Rec., 34) and refused by the court, it will be observed, assumes the testimony of Braden to be true and declares that his testimony with all inferences that may be justifiably drawn therefrom in favor of the plaintiff does not justify a finding in the plaintiff's favor.

In taking the testimony of Braden to be true, there is, of course, to be considered only that portion of his testimony which is competent and legitimate evidence. As already stated and as shown by the record, Braden's testimony (Rec., 21, 22) was that the first he knew of the transaction was that the note made by Hopkins was called, or in other words, that payment thereof was demanded, and that all his testimony as to matters occurring prior to that time was mere hearsay. Consequent-

ly in considering whether the testimony of Braden, if taken as true, with all inferences that might justifiably be drawn therefrom would justify a verdict in favor of the plaintiff, it is only admissible to assume as true that portion of his testimony, which relates to what occurred after the Hopkins note was called or payment thereof was demanded. In order that there may be no mistake or misapprehension as to what this portion of his testimony was, we deem it proper to quote it in full as set forth in the record. After having endeavored to make it appear that the stock securing the Hopkins note was stock which the bank had taken in to secure debts previously contracted, and after having failed to make any intelligible explanation of why the stock as taken in should be used as collateral security for Hopkins' note, Braden testified as follows:

"Q. This transaction is a thing I don't understand. "I would like to have you explain why, if the bank took "in stock for a precedent debt of some stockholder, why "it didn't take it directly? Why it resorted to the "means of having Hopkins give his note to a broker?

"A. Well, I presume the other witness can tell "more about that transaction than I can, for, as I can "say, all I know about that transaction is hearsay, be- "cause I knew nothing of the transaction when it was "made.

"Q. But you do know that a demand note which the "brokers held against the bank—which the holders held "against Hopkins—a demand note made by Hopkins to "the brokers was called?

"A. I know that. That is the first I knew of the "the transaction.

"Q. And the brokers demanded payment of it?

" A. Yes. The brokers demanded payment of it.

" Q. Now, that money was paid out of money of the " bank?

" A. To the brokers; yes.

" Q. Hopkins' note was taken up?

" A. Yes.

" Q. And thereupon you executed your note to get " the money to replace that that was taken out?

" A. That is correct; to get the money for the bank, " and took the stock out of the bank for the time being. " The whole difficulty we could not get the bank exam- " iner, who has since been deposed from office, to give " any information as to how that stock should be car- " ried.

" Q. What I want to know is whether that is not a " true statement of the transaction—that Hopkins gave " his individual note to the brokers for stock?

" A. No; I can't testify positively on that, but my " hearsay evidence is not that.

" The COURT: Well, don't let us have too much of " that in the record.

" The WITNESS (continuing): So that I say the wit- " ness that you will call can tell more about that orig- " inal transaction.

" Q. You knew that Hopkins' note was called?

" A. I knew that Hopkins' note was called.

" Q. And you or the bank paid the note?

" A. Yes.

" Q. And thereupon you borrowed money through " Wetmore to replace that which was used to pay the " Hopkins note?

" A. Well, shortly thereafter.

" Q. That is what it was for, isn't it?

" A. Yes.

" Q. And the purpose was to cover up this transac-
" tion so that it would not appear that the bank had
" bought its own stock?

" A. To get the money for the bank, but we didn't
" know just how we could carry that, and I don't think
" any of the officers of the bank had ever had any ex-
" perience like that.

" Q. Who authorized you to borrow money for the
" Chemical National Bank?

" A. The president.

" Q. Anybody else?

" A. Some of the directors knew of the transac-
" tion.

" Q. The board of directors didn't authorize it?

" A. It was not done at board of directors' meeting;
" no.

" Q. They didn't authorize you to give your note for
" the bank?

" A. No; but the cashier of the bank is authorized
" at any time without authority from the president or
" board of directors to borrow money for the bank.

" Q. He is?

" A. Yes, sir.

" Q. Well, the bank was not needing money?

" A. It was. It was short at that time. Inquiries
" had been coming quite heavily against us. Our de-
" posits had been running down. I saw a book in your
" office a few days ago that I can refer you to, because
" that says the cashier can have authority at any time
" without special authority from the board of directors
" to borrow money for the bank.

" The COURT: Do you mean by resolution?

" A. Without any resolution thecashier of any bank—

"The COURT: Do you mean there was a resolu-
"tion?

"A. No, sir; there was no resolution, but I say as a "matter of fact the cashier of a bank has authority at "any time to borrow money for his bank."

The case made by this testimony of Braden, assuming it to be true, together with all inferences that may justifiably be drawn therefrom, may be stated thus:

The individual demand note of the assistant cashier of a national bank was held by some brokers. Payment of it being demanded, the cashier of the bank paid it out of the moneys of the bank. To replace the money so used, the cashier procured money upon his own individual note, and turned over to the bank the money thus borrowed. The borrowing of the money by the cashier was authorized by the president of the bank, but not by its board of directors.

If this is a correct statement of the case made by so much of Braden's testimony as was competent, and it clearly is, it is plain that the trial court, in refusing to hold the third proposition as law, in the decision of the case, must have decided not only that a cashier of a national bank has implied authority to borrow money in its behalf, but that it is immaterial for what purpose he exercises that power. In so doing, it placed upon Section 5136 of the Revised Statutes, defining the powers of national banks, a construction contrary to that given by the court in *Western National Bank* v. *Armstrong*, 152 U. S., 346, and therefore it erred.

As to the sixth (Rec., 37) and the eighth (Rec., 39) propositions, it is not necessary that we do more than point out that they embrace no material point that is not

sufficiently presented in the first, second and third propositions commented on above. Hence, we shall not now trouble the court with any additional argument to show that the trial court should have held them as law.

In conclusion, therefore, we respectfully submit that the trial court erred in refusing to hold as law, in the decision of the case, the propositions we have thus reviewed, and in so doing imposed upon the defendant a liability that could not, under the evidence, be fastened upon it without disregarding Sections 5136 and 5201 of the Revised Statutes of the United States. To hold the defendant liable under the facts supposed in the propositions, is not only to place no limit upon the power of a cashier of a national bank to borrow money, but also to hold that the prohibition against the purchase by a national bank of shares of its own stock can be nullified by a resort to indirection.

II.

IF THE TRIAL COURT ERRED IN REFUSING TO HOLD AS LAW APPLICABLE TO THE DECISION OF THE CASE EITHER ONE OF PROPOSITIONS ONE, TWO, THREE, SIX AND EIGHT, THE JUDGMENT OF THE SUPREME COURT OF ILLINOIS SHOULD BE REVERSED.

Counsel for the plaintiff having informed us that they will insist that no federal question, or at least no doubtful one, is involved in the case, and that for that reason the writ of error should be dismissed or the judgment affirmed, we have deemed it proper, by way of anticipating their argument, to offer a few suggestions to show that their position in that respect is untenable.

From a consideration of the evidence in this case, and

of the propositions of law offered in behalf of the defendant and refused by the trial court, it is evident that, in order to justify an affirmance of the judgment, it was necessary that the Supreme Court of Illinois should hold and decide either, *first*, that the cashier, Braden, by virtue of his office, had, under the laws of the United States regulating national banks, implied authority to borrow money in the name of the defendant and bind it to repayment thereof; or, *second*, that the transaction out of which the discounting of the Braden note arose, which transaction consisted of the original purchase of the fifty shares of the bank's stock, the giving of the Hopkins note, and the payment thereof out of the moneys of the bank was one which, in law, could be regarded as a transaction of the bank.

If the Supreme Court of Illinois decided the first proposition in the affirmative, it placed a construction on the laws of the United States regulating the powers of national banks and their officers in conflict with that announced by the court in *Western National Bank* v. *Armstrong*, 152 U. S., 346, and it therefore can scarcely be contended that it did not decide a federal question and decide it incorrectly.

If, on the other hand, it decided the second proposition in the affirmative, it decided that, notwithstanding section 5,201 of the Revised Statutes of the United States, the president and cashier of a national bank, without authority from the board of directors, can, merely by agreement among themselves, purchase stock in the name of one individually, use the bank's money for the payment of the purchase price, and make the bank a party to the transaction; or, in other words, make it a party to an il-

legal transaction against its own will. That this is a federal question seems too clear for discussion.

In determining what the Supreme Court of Illinois decided but little light can be obtained from their opinion, for it seems to us to prove nothing except that the court were under a serious misapprehension both as to the contents of the record and as to the rules of law applicable to the controversy between the parties. It is only by a consideration of the record of the trial court, and of the effect of its rulings, that it can be determined what is the effect of the decision now under review.

It may, however, be contended that this is one of the class of cases in which it has been held that where the decision below was upon two or more independent grounds, one of which is not a federal question, this court will affirm the judgment. Of this class the following are examples:

Murdock v. *Memphis*, 20 Wall., 590.
Adams Co. v. *B. & M. R. R. Co.*, 112 U. S., 123.
De Saussure v. *Gaillard*, 127 U. S., 216.
Hale v. *Akers*, 132 U. S., 554.
Hopkins v. *McClure*, 133 U. D., 380.
Blount v. *Walker*, 134 U. S., 607.

But when this record is examined it will be found not only that the propositions referred to were decisive of the case, but also, in any event, that under the evidence, assuming it to be conflicting, if the decision of the trial court with respect to either of these propositions was erroneous, the defendant was entitled to have the judgment reversed and the cause remanded, with directions to the trial court to award a new trial.

Section 41 of Chapter 110, R. S. of Illinois of 1874, provides as follows:

"In all cases, in any court of record of this state, if "both parties shall agree, both matters of law and fact "may be tried by the court; and upon such trial either "party may, within such time as the court may require, "submit to the court written propositions to be held as "law in the decision of the case, upon which the court "shall write 'refused' or 'held,' as he shall be of opin- "ion is the law, or modify the same, to which either "party may except as to other opinions of the court."

Under this statute it has been repeatedly held that the finding of the trial court as to the facts has the same force and effect as the verdict of a jury.

Cook v. *Thayer*, 11 Ill., 617.
French v. *Lowry*, 19 Ill., 158.
Wood v. *Price*, 46 Ill., 438.
Field v. *C. & R. I. R. R. Co.*, 71 Ill., 458.

In the case last cited the Supreme court of Illinois say:

"This court has often held, where a trial is had by the "court, as to the facts, the court stands in the place of "the jury, and the decision will be reversed or affirmed "by the same rules which govern when the facts are "tried by a jury."

Accordingly, it was also held by that court that, when a cause is tried by the court without a jury, the refusal of the trial court to hold as law applicable to the decision of the case a correct proposition, embodying a supposed case which the evidence tended to prove was ground for reversal, although but for such ruling of the trial court its judgment would have been sustained.

Sexton v. *Chicago*, 107 Ill., 323.
Cothran v. *Ellis*, 107 Ill., 413.

The trial court having refused the propositions referred to, it is not permissible to defeat the jurisdiction of this court by the claim, that even if the trial court had held such propositions as law, it *might* have found the issues in favor of the plaintiff upon other grounds not involving a federal question. There is nothing in this record to justify the presumption that the trial court, if it had held the propositions referred to as law applicable to the decision of the case, would nevertheless have found the issues in favor of the plaintiff. On the contrary, it must be assumed in this case, as in the case of a trial by jury, that erroneous rulings of the court were injurious to the party complaining, and resulted in a verdict or finding which, but for such rulings, would not have been given. To hold otherwise would practically defeat the jurisdiction of this court to review the judgment of a state court, in almost every case where there had been a trial by jury.

But the claim, if it be made at all, that there is an independent ground not involving a federal question, upon which the case was decided by the state court, cannot be supported. It is true the Supreme Court of Illinois attempts to hold the bank liable upon the ground that it borrowed the money of the plaintiff, and that the borrowing of the money and the purchase of the stock were separate and distinct transactions, and in its opinion, among other things, says:

"Here the Chemical National Bank received from the "plaintiff $5,000, which it agreed to pay. Braden, who "signed the note, had no interest in the transaction. "Wetmore had no interest. He acted merely as an "agent in procuring the loan for the defendant, and "transferred the note over to the plaintiff without re-"course, and passed the money which the note repre-

" sented, from the plaintiff to the defendant. It is the " party liable to pay the money, and the City Bank of " Portage is the party entitled to receive the money; and " in an action for money had and received we see no rea- " son why the plaintiff may not surrender the note in " court and recover a judgment for the amount of the " money.

" It is, however, contended in the argument that a re- " covery cannot be had on the common counts, for the " reason that the money was borrowed in furtherance of " a transaction which, if engaged in by defendant, would " be illegal. The alleged illegality is that the stock " pledged by Braden was not stock taken by the bank in " satisfaction of a debt, but was bought by the bank and " the note of Hopkins, assistant cashier, given for the " same, and that this same stock was subsequently " pledged by Braden for the loan obtained by the plaint- " iff. Curry, president of the Chemical National Bank, " was called as a witness, and it may be inferred from " his evidence, although he does not state the fact, that " the bank stock procured by the bank was not taken on " a debt, but was purchased. Conceding that the Chem- " ical National Bank purchased fifty shares of its own " stock, contrary to the provisions of the national bank- " ing act, does that unlawful act so pollute the trans- " action between plaintiff and defendant, under which " plaintiff loaned its money, that the defendant may keep " the money and the plaintiff bear the loss? If the facts " were as claimed by counsel, they would not defeat a " recovery on the part of plaintiff. The purchase of the " stock and the borrowing of the money from plaintiff " were two distinct transactions. In the purchase of the " stock money used by the defendant in payment was

"raised on a note of Hopkins, assistant cashier. After-
"wards the bank paid the Hopkins note with its own
"funds, and this ended the transaction so far as the
"purchase of stock was concerned. After this transac-
"tion was ended the bank applied to the plaintiff for a
"loan of money and obtained it, placing the bank's
"stock previously obtained in the hands of plaintiff as
"collateral. The plaintiff did not know where, of whom
"or in what manner the Chemical National Bank had
"acquired the bank stock turned over as collateral, nor
"did it know what use that bank would make of the
"money loaned. Moreover, this money was not loaned
"by plaintiff to pay for bank stock, and, so far as ap-
"pears, it was never used for that purpose. So far as
"appears from the evidence, there was nothing illegal
"in the transaction between plaintiff and defendant
"which resulted in the loan of $5,000."

But there are two reasons why this expression of opinion by the Supreme court cannot defeat the right of the bank to have the judgment reversed, if the trial court ruled erroneously with respect to the propositions referred to.

First. By Section 88 of Chapter 110, R. S. of 1874, it is provided as follows:

"The Supreme Court shall re-examine cases brought
"to it by appeal or writ of error as to questions of law
"only, and no assignment of error shall be allowed
"which shall call in question the determination of the
"inferior or appellate courts upon controverted ques-
"tions of fact in any case, excepting those enumerated
"in the preceding section, (*i. e.*, chancery cases, crim-
"inal cases and cases involving a franchise or freehold
"or the validity of a statute, or the construction of the

" constitution, or cases relating to revenue or in which " the state is interested as a party or otherwise)."

It is apparent from these provisions of the Illinois statutes that in the case at bar the Supreme Court of Illinois had no power to decide any controverted question of fact, and that its power and duty was limited to deciding whether the propositions of law which the trial court was asked to give on behalf of the defendant were correct and applicable to the evidence. If the evidence was of such a character as would have justified the trial court in finding for the defendant, if it had held the propositions offered by the defendant to be sound, it was the duty of the Supreme court to reverse the judgment and remand the cases for a new trial. It had no power to take upon itself the decision of controverted questions of fact, and affirm the judgment notwithstanding the trial court erroneously refused to give the defendant the benefit of an immunity afforded by a statute of the United States.

Second. The views expressed by the Supreme Court of Illinois are so manifestly erroneous and unwarranted that its opinion is entitled to no weight or consideration from this court :

1. After stating that it was claimed a recovery could not be had " for the reason that the money was bor- " rowed in furtherance of a transaction which, *if engaged* " *in by the defendant*, would be illegal," the learned judge who delivers the opinion proceeds to decide the point upon the assumption that the *bank* purchased the stock and borrowed the money. In doing this the learned judge assumed as true the very fact which the defendant denied, and which was essential to the plaintiff's right to recover, to wit: that the transaction was a

transaction of the *bank* and not of the cashier individually. Defendant did not deny that if it, as a corporation, had purchased the stock and borrowed the money, it would have been liable to the plaintiff, but it insisted that the transaction was the individual transaction of the cashier and that its illegality, if regarded as a corporate transaction, forbade its being treated as one which the cashier had *implied* power to make on its behalf.

2. The learned judge also says "the *bank* paid the "Hopkins note with its own funds." The fact was, that the cashier, without authority from the bank improperly used its money to pay the individual note of Hopkins. There was no evidence whatever that the bank, as a corporation, ever had anything to do with the transaction. Indeed, the president and cashier of the bank took every possible precaution to prevent the transaction becoming or appearing upon the books of the bank as a transaction of the bank itself.

3. The learned judge also says that "the *bank* ap- "plied to the plaintiff for a loan of money and obtained "it." But the fact was that the cashier borrowed the money in his individual name and upon his individual credit, and that the bank had nothing whatever to do with the transaction.

4. The learned judge also says that "the plaintiff "did not know where, of whom, or in what manner the "Chemical National Bank had acquired the bank stock "turned over as collateral, nor did it know what use "that bank would make of the money loaned."

This language of the court would seem to indicate that the court assumed that the plaintiff actually dealt with the bank or at least supposed that it was dealing with

the bank when it made the loan, whereas, as we have already seen, the plaintiff dealt with Braden individually and it did not in fact have any knowledge that the defendant was connected with the transaction in any manner.

5. Finally the learned judge says: "Complaint is "made that the court refused to hold certain propositions of law on behalf of defendant. *These propositions all related to the right of recovery on the note set out in the special count of the declaration*, and if "the plaintiff was entitled to recover under the common "counts for money had and received, which we have "endeavored to show he was, it was unimportant "whether the court ruled correctly on the propositions "or not." If the learned judge gave proper consideration to the propositions referred to, it is difficult to understand how he could come to the conclusion they were so framed as to relate solely to the right of recovery upon the note.

a. The first proposition, after reciting the facts, concludes that "the court should find that said note was "the individual note of Braden and not the note of the "defendant, *and should find the issues in favor of the "defendant.*" In other words the proposition was that, under the facts supposed, the plaintiff could not recover under either the special count or the common counts, for manifestly the court could not find the issues in favor of the defendant if the plaintiff was entitled to recover under the common counts.

b. The second proposition was to the effect that if Curry's testimony was true, "the court must find the issues joined in favor of the defendant." While the proposition refers to "the circumstances connected with

"the execution by Braden of the note sued on," yet as those circumstances are the identical circumstances from which is to be determined the question whether there can be a recovery under the common counts, it is plain that the proposition cannot be held to be one limited to the right of recovery on the note. In order to establish its right to recover, the plaintiff relies upon the receipt by the defendant of the proceeds of the Braden note, and as the circumstances under which the defendant received the money are embraced in and identical with those under which the note was executed, it is plain that the proposition was broad enough to cover the question of the right of recovery under the common counts.

c. The sixth proposition is divisible into two parts, by one of which it is declared a purchase of stock cannot be regarded as a transaction of the bank under certain circumstances mentioned, and by the other it is declared a promissory note made in connection with such purchase, and under the same circumstances cannot be regarded as a transaction of the bank. It is too plain for argument that this proposition does not relate solely to the right of recovery upon the promissory note, but that it is equally pertinent in respect to the right of recovery under the common counts. If the purchase of the stock was not a purchase by the bank, the loan of money made by Braden in his individual name and upon his individual credit was not a loan of the bank, and the money thus loaned could not be recovered from the bank under the common counts or otherwise.

d. The eighth proposition does not mention the note at all. It relates to the liability of the bank upon a contract that is *ultra vires*. The liability of defendant which plaintiff seeks to enforce under the common counts

is upon a contract, either express or implied, for the repayment of the money loaned. Hence the proposition was as applicable to plaintiff's claim of right to recover under the common counts, as it was to its claim of right to recover upon the note.

e. The third proposition likewise makes no mention of the note, but simply declares that Braden's testimony, even if true, "*does not justify a finding in favor of "the plaintiff.*" How the learned judge who delivered the opinion could conceive that such an instruction related only to the right of recovery under the common counts is incomprehensible.

Great as is our respect for the Supreme court of Illinois, we yet feel compelled to insist that the views expressed in its opinion evidence so great a misapprehension, not only as to what the evidence was upon the trial and as to the meaning of the propositions referred, but also as to the rules of law applicable to the case, as to disentitle it to any weight. It manifestly erred in not reversing the judgments of the appellate and trial courts, and for that reason its own judgment should be reversed, and the cause should be remanded.

Respectfully submitted.

HIRAM T. GILBERT,

For Plaintiff in Error.

Office Supreme Court U. S.
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JAMES H. McKENNEY,
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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1895.

No. 736.

CHEMICAL NATIONAL BANK OF CHICAGO, *Plaintiff in Error,*
vs.
CITY BANK OF PORTAGE, *Defendant in Error.*

Error to Supreme Court of Illinois.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

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ATTORNEYS FOR DEFENDANT IN ERROR.

BARNARD & MILLER, PRINT., CHICAGO.

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Brief and Argument for Defendant in Error.

Statement of the Case.

As this case comes before the court upon a writ of error to the Supreme court of a State, the question which naturally first claims our attention is whether the case falls within the class in which this court is authorized to review the judgments of State courts. For if it does not, a discussion of the other questions presented in the brief of opposing counsel becomes unnecessary.

The case presented in the trial court was this: The City Bank of Portage sued the Chemical National Bank in an action of *assumpsit*, and filed a declaration containing the common counts and a special count upon a note signed by C. E. Braden, alleging that the defend-

ant executed the note in the name of Braden, who was its cashier (*Record, p. 5*). The defendant pleaded the general issue, and a plea denying the execution of the note described in the special count. Under the statutes and practice in Illinois no defense relating to the consideration of a note is admissible under the general issue, but must be specially pleaded. (Rev. Stat. Ill., Chap. 98, § 9; *Rose* v. *Mortimer*, 17 Ill., 475; *Sheldon* v. *Lewis*, 97 id., 640). No such plea was filed, and the plaintiff was therefore entitled to judgment under the special count, if it proved that the note was, in legal effect, the note of the defendant, and to judgment under the common counts, if it proved that the defendant was indebted to it for money loaned, money had and received, etc.

On the trial in the Superior court of Cook county a jury was waived, and the case submitted to the court. The issues were found in favor of the plaintiff and judgment entered on the finding. This judgment was affirmed by the Appellate court, and by the practice in Illinois this affirmance conclusively settled against the defendant every fact necessary to support the judgment. (*Bridge Co.* v. *Commissioners*, 101 Ill., 518.) The decision of the Appellate court was affirmed by the Supreme court of Illinois, and a reversal of the judgment of the latter court is sought upon the ground that it decided, and decided erroneously, a federal question.

The material facts proved on the trial of the case, briefly stated, are as follows: In the early part of 1893 the Chemical National Bank had taken some of its own stock in payment of a debt. This stock was carried and treated by the directors and the bank examiners as treasury stock. (*Record, pp. 15–18–21.*) As the bank was

short of money, it desired to realize on this stock, and adopted this means of doing it, and, at the same time, of concealing the fact from the public that it was borrowing money for its own use. It had its assistant cashier, Hopkins, give a note, payable to a firm of brokers, with a part—$5,000—of this treasury stock as collateral. The brokers procured the money on the note, and paid it to the bank, the assistant cashier not getting any of it. After this note had been running about fifteen days the loan was called in by the brokers, so that the bank had to refund the money on the Hopkins note, thereby getting back this treasury stock again. It was then agreed between Curry, the president, Braden, the cashier, and Hopkins, the assistant cashier, that the bank should raise $5,000 through a broker in Minneapolis, by giving a note in Braden's name, payable to the broker, with the stock as collateral, and that, as the bank was to have the money, the note should be the bank's obligation, and be paid by it. (*Record, p. 21.*) In carrying out this transaction the note in suit was given. It was signed by Braden in his own name, omitting the designation "cashier." It was payable to Wetmore, a broker in Minneapolis, and fifty shares of the treasury stock thus held by the bank were issued in Braden's name and attached to the note as collateral. Braden did not own this stock or pay for it (*Record, p. 10*), and it was pledged with the note simply to give it greater credit and facilitate getting the money. The note was sent to Wetmore at Minneapolis, and he procured the money on it from the plaintiff, the City Bank of Portage, and sent it to the Chemical National. Wetmore himself did not advance any money on the note, either to Braden or to the Chemical. He did not owe Braden anything, and the note

was given by Braden to him purely as a means of raising money for the bank, without letting that fact—which would affect the credit of the bank's stock—be known. The bank thus stood in the position of an undisclosed principal. Braden had no interest in the transaction, received none of the money, and did not own the collateral. The first person who advanced money on the note was the plaintiff, and the endorsement (without recourse) by Wetmore to it was the first negotiation of the note. The money which it thus advanced went directly to the Chemical National, through the agents which it had authorized to procure the money in this way.

None of these facts were denied by the defendant's witness, Curry. He testified that the directors had instructed him to buy stock of the bank, when offered for sale at par, up to $100,000, agreeing to themselves take it as soon as they could. It seems to be his impression that the stock which was annexed to the note in suit, was a part of the stock purchased in this way, but does not state the fact positively, and obviously does not know whether it was a part of that stock, or—as Braden says—stock which it took as payment of its claim against L. R. Giddings.

Curry further says, that as the bank's money has been paid out for the stock, it was carried as a cash item, until by means of the transaction which Braden testifies to, it obtained the money again from the City Bank of Portage. (*Record pp. 27–8.*) In other words, the certificate of stock was carried in the cash drawer as so much currency, until the actual money was obtained from the plaintiff.

There were thus presented two theories upon which, on these facts, the plaintiff was entitled to recover, *viz.*

1. That the note was the note of the bank executed in Braden's name.

2. That the bank was liable for the loan or upon an equitable claim for momey had and received.

The defense set up on the trial was that the transaction out of which the note arose, and of which it was a part, was an illegal one. The theory of this defense was that it was illegal for Curry to buy stock of the bank with its funds, and that, having done so, it was equally illegal for him to borrow money to replace the money paid out in making the purchase.

Upon these facts we submit the following propositions.

I.

NO FEDERAL QUESTION WAS INVOLVED IN THE CASE.

Murdock v. *Memphis*, 20 Wall., 590.
Coppell v. *Hall*, 7 Wall., 542.
Embrey v. *Jemison*, 131 U. S., 336.
Greenhood on Public Policy, 125–6.
National Bank v. *Matthews*, 99 U. S., 621.
National Bank v. *Whitney*, 103 U. S., 99.
Fortier v. *New Orleans Bank*, 112 U. S., 439.
Gold Mining Co. v. *National Bank*, 96 U. S., 640.

II.

IF A FEDERAL QUESTION WAS INVOLVED TO ANY EXTENT, IT WAS NOT SO INVOLVED OR SO DECIDED AS TO AUTHORIZE THIS COURT TO REVIEW THE DECISION OF THE SUPREME COURT OF ILLINOIS.

Murdock v. *Memphis*, 20 Wall., 590.
Spies v. *Illinois*, 123 U. S., 131.
Blount v. *Walker*, 134 U. S., 607.
DeSaussure v. *Gaillard*, 127 U. S., 216.

III.

ON THE MERITS OF THE CASE THE DECISION OF THE STATE COURT WAS RIGHT; BUT EVEN IF WRONG IT IS NOT OPEN TO REVIEW.

Laflin v. *Howe*, 112 Ill., 253.
Barnes v. *Johnson*, 84 Ill., 95.
National Bank v. *Case*, 99 U. S., 628.
Murdock v. *Memphis*, 20 Wall., 590.

I.

NO FEDERAL QUESTION WAS INVOLVED.

The jurisdiction of this court to review the decisions of state courts is by the statute creating it, confined to cases,

1. Where there is *drawn in question* the validity of a statute of or an authority exercised under the United States and the decision is against their validity.

2. Where there is drawn in question the validity of a state statute or authority or the ground of its violating

the Federal Constitution, or laws, and the decision is in favor of their validity.

3. Where a right, title, &c., is claimed under the Federal Constitution or laws, and the decision is against the right so claimed.

In construing the statute which confers this jurisdiction, and in determining what effect the existence of a federal question will have in a case this court has said.

"Nor is the mere existence of such a question in the case sufficient to give jurisdiction; the question must have been *decided* in the State court. Nor is it sufficient that such a question was raised and was decided. It must have been decided in a certain way, that is against the right set up under the constitution, laws, treaties or authority of the United States. The federal question may have been erroneously decided. It may be quite apparent to this court that a wrong construction has been given to the federal law, *but if the right claimed under it by plaintiff in error has been conceded to him*, this court cannot entertain jurisdiction of the case, so very careful is the statute, both of 1789 and 1867, too narrow, to limit and define the jurisdiction which this court exercises over the judgments of the State courts."

Murdock v. *Memphis*, 20 Wall, 590 (627).

What is the federal question in this case? What right or privilege secured to the plaintiff in error by the federal laws has been denied to it by the State court?

Counsel has evidently had some trouble with this point and has been at a loss to formulate the federal question which gives this court jurisdiction. He expressly concedes that the opinion of the Supreme court of Illinois does not show that it passed upon any such question; in fact that opinion shows exactly the reverse. And he further concedes that it is only by inference from the mere fact that the judgment of the trial court was affirmed,

that we can now determine what the federal question was or how it was decided. For he says:

"It is evident, that in order to justify a judgment of affirmance of the judgment, it was necessary that the Supreme court of Illinois should hold and decide either, *first*, that the cashier, Braden, by virtue of his office, had, under the laws of the United States regulating national banks, implied authority to borrow money in the name of the defendant and bind it to repayment thereof; or, *second*, that the transaction out of which the discounting of the Braden note arose, which transaction consisted of the original purchase of the fifty shares of the bank's stock, the giving of the Hopkins' note and the payment thereof out of the moneys of the bank was one which, in law, could be regarded as a transaction of the bank." (*Brief, p. 30.*)

The court will notice that counsel concedes not only that the opinion of the State court does not pass upon these questions, but that it is impossible to determine which of them was decided. But as it is contended that both present federal questions we will examine them in the order stated.

The first proposition which counsel says the State Supreme court necessarily decided is that Braden had implied authority under the National Bank Act to borrow money in the bank's name. But when we turn to the written propositions of law, which under the Illinois practice were required in order to show what questions of law the court decided, we find that this question was not presented, even indirectly. And it is clear that if the question was not presented in the trial court, the Supreme court, which heard the case only in review, could not have decided,—at least not unless it did so expressly in its opinion. And even then it is doubtful if the question could be a controlling one, so as to give this court

jurisdiction. But it is not necessary to determine whether that would be so or not.

Nor is there anything on which to base the statement that the court passed upon the authority which the National Bank Act gives to a cashier. For the question of his authority in any particular transaction, is not solely one of federal law, but one of agency, depending upon the general principles of law relating to agency and to corporations. And the court in this case could not have been called upon to pass on mere abstract propositions of law as to a cashier's authority, but was only bound to decide the concrete question as to the bank's liability on the facts actually presented before it. And clearly a national bank might not be bound by the act of its cashier in one case, and might be bound by a similar act in another case, where it had either expressly given the requisite authority or allowed him to exercise it without objection, or so conducted itself as to bring into operation the rules and principles of the law of estoppel. Those rules and principles do not arise from federal statutes or decisions, but are a part of the general law, and each state has the right to decide the manner and the extent to which they shall be applied within its borders. On these questions it is not bound to conform its decisions to those of this court, nor to enforce one rule for a national bank, and another for a state corporation.

But this case does not in any way depend on the extent of the implied powers of a cashier. It is undisputed that the president and other officers of the bank authorized all that was done, and accepted the money from the Portage Bank with knowledge of all the circumstances. And if, as counsel contend, the transaction by which this money was obtained from the Portage Bank is to be re-

garded as part of the purchase of stock with the bank's funds, then it was authorized by the board of directors. Curry says the instructions to buy stock were given by the directors at a meeting of the full board, but no entry was made on the record. (*Record, p. 28.*)

The second proposition stated by the counsel as having been impliedly decided by the State Supreme court is, "that the transaction out of which the discounting of "the Braden note arose, which transaction consisted of "the original purchase of the fifty shares of the bank's "stock, the giving of the Hopkins note, and the payment "thereof out of the moneys of the bank, was one which, "in law, could be regarded as a transaction of the "bank."

Here counsel assumes—and it is the gist of this proposition—that the procuring of the money on the Braden note was a part of the original purchase of stock, months before. Now, whatever may be said of the other points in the case, it was certainly within the power of the state courts to decide that question of fact adversely to plaintiff in error. Its decision on such a question is not open to review here, and the question is concededly essential to the theory on which this case is brought to this court. The State Supreme court decided in express terms that the borrowing of the money from the Portage Bank on the Braden note had nothing to do with the original transaction, which was alleged to be illegal. We quote its decision on this point (*Record, pp. 53, 54*):

"It is, however, contended in the argument that a recovery cannot be had on the common counts, for the reason that the money was borrowed in furtherance of a transaction which, if engaged in by defendant, would be illegal. The alleged illegality is that the stock pledged by Braden was not stock taken by the bank in satisfaction

of a debt, but it was bought by the bank, and the note of Hopkins, assistant cashier, was given for the same; that this same stock was subsequently pledged by Braden for the loan obtained of the plaintiff.

Curry, president of the Chemical National Bank, was called as a witness, and it may be inferred from his evidence, although he does not state the fact, that the bank stock procured by the bank was not taken in on a debt, but purchased. Conceding that the bank purchased fifty shares of its own stock, contrary to the provisions of the national banking act, does that unlawful act of the bank so pollute the transaction between plaintiff and defendant under which plaintiff loaned its money, that the defendant may keep the money and the plaintiff bear the loss? If the facts were as claimed by counsel, they would not defeat a recovery on the part of plaintiff. The purchase of the stock and the loaning of the money from plaintiff were two distinct transactions; in the purchase of the stock, the money used by the bank in payment was raised on the note of Hopkins, assistant cashier. Afterwards the bank paid the Hopkins note with its own funds, and this ended the transaction so far as the purchase of stock was concerned. After this transaction was ended, the bank applied to the plaintiff for a loan of money and obtained it, placing the bank stock previously obtained in the hands of plaintiff as collateral.

The plaintiff did not know where, of whom, or in what manner the Chemical bank had acquired the bank stock turned over as collateral, nor did it know what use the bank would make of the money loaned. Moreover this money was not loaned by plaintiff to pay for bank stock, and so far as appears it was never used for that purpose. So far as appears from the evidence there was nothing illegal in the transaction between plaintiff and defendant which resulted in the loan of five thousand dollars."

Thus it is plain that the Supreme court of Illinois did not decide a federal question, but gave judgment against the plaintiff in error upon wholly independent grounds. In such cases this court has no jurisdiction to review its decision. As was said in *Blount* v. *Walker*, 134 U. S., 607:

"To give this court jurisdiction of a writ of error to a state court it must appear affirmatively, not only that a federal question was presented for decision to the highest court of the state having jurisdiction of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it. *New Orleans Water Works Co.* v. *Louisiana Sugar Refining Co.*, 125 U. S., 18; *Klinger* v. *Missouri*, 13 Wall., 257; *De Saussure* v. *Gaillard*, 127 U. S., 216; *Hopkins* v. *McLure*, 133 U. S., 380."

Counsel seeks to avoid the effect of this point in two ways: *first*, because he says that the Supreme court had no right to determine that the two transactions were entirely separate, as that was a question of fact. *Second*, because its views on the case do not accord with his, and are not entitled to any weight whatever. Concerning this second point, it will be sufficient to say that unless a federal question was involved and decided adversely to plaintiff in error, it is immaterial whether the decision on the merits was right or wrong according to the views of this court.

On the other point—that the Supreme court could not review a question of fact—it seems to us very clear that this court is concluded by the decision of the state court. For it is purely a question of State law, and of the construction of State statutes and State practice; and on such questions the decision of the State Supreme court has always been accepted as conclusive. It would be indeed strange if the Supreme court of a State were not the final arbiter of the jurisdiction which the laws of the State gave it, and of the extent and manner of exercising that jurisdiction.

The proposition contended for by opposing counsel is based on the assumption that the Supreme court not only decided a question of fact, but decided it differently from

the lower courts. For if it decided the facts the same as the lower courts, there is clearly no legal ground for complaint. There is nothing at all to show how the Appellate court decided the questions of fact, and nothing except the hypothetical propositions of law from which to determine what the trial court held on the facts. There is no proposition of law directly presenting the question on which counsel bases the whole case, *viz.*: that the loan on the Braden note was part and parcel of the original purchase of the stock.

The first proposition (*Record, p. 31-2*) simply presents the successive events in their chronological order, and not as being integral, inseparable parts of one entire transaction. None of the others present the question in any recognizable form.

But if the question were an open one there could be no doubt that the loan on the Braden note was not a part of the original purchase of the stock. We do not see how counsel can claim the contrary in view of his earnest contention that Braden did not even know of the original purchase. And on his statement of the facts there were two distinct transactions. One was the purchase of the stock, by the Chemical National Bank, long before it entered into the transaction with the plaintiff or had it in mind. The money which it paid out in buying the stock it borrowed upon a note executed in the name of its assistant cashier—Hopkins. The plaintiff's money had nothing to do with that transaction. After the Hopkins note matured and had been paid by the bank, it again borrowed money upon the Braden note. This was the second transaction, or, rather—counting the purchase of the stock as the first—it was the third. Of the prior transactions—the purchase of the stock, the borrowing of

money on the Hopkins note, or the purpose for which the money was borrowed on this one—the plaintiff bank knew nothing. Now, where is the illegality in the transaction by which the defendant got *this* money? It did not get it by virtue of or as a part of the purchase of the stock. It did not borrow it to pay for the stock, nor use it for that purpose. Having completed the transaction which is alleged to be illegal, it borrowed money from an innocent third party for the purpose of replenishing its funds.

The proposition on which the plaintiff in error rests may fairly be stated thus:

If a national bank buys some of its stock, pays the purchase price, borrows from an innocent third party the amount so paid, pays the loan, and again borrows from another innocent party the same amount, he cannot maintain a suit to recover the loan.

We submit that this proposition is not merely untenable; it is absurd.

But be the proposition good or bad, the facts of this case do not fit it. For it rests upon the assumption that the stock which was pledged to secure this note was stock which the bank purchased illegally. This is not the fact. It was stock which the bank had to take to protect itself upon its claim against L. R. Giddings. It had been carried for a long time by the bank as asset, was known to the bank examiner, and was treated by the directors as treasury stock. Curry's testimony shows plainly that the bank had other stock than that which he bought at the instance of the directors, and he states no fact which shows that the stock pledged with this note was not a part of the stock which the bank had legitimately obtained. If the fact had any significance, the burden was on the plaintiff in error to show it.

The proposition also rests upon the assumption that the stock and not the note was the principal thing in this transaction—an assumption clearly untenable. The stock was merely pledged as collateral to the note; it was a mere incident to the debt, in no way relating to the personal liability for the payment of the debt. It would certainly be a novel proposition of law that a man's liability for his debt could be affected by the character of the collateral which he pledged to secure its payment. If the security was illegal or void, the fact might affect the creditor's ability to enforce payment out of it, but it cannot be seriously contended that it would discharge the debtor from the obligation of paying the debt.

In the petition which it filed in the State Supreme court for the allowance of this writ of error, the plaintiff in error alleged, as the only ground for its issuance, that "your petitioner in said cause claimed immunity from "liability to the plaintiff in said cause in the trial court "under section 5,201 of the Revised Statutes of the "United States," and that the decisions of the Superior, Appellate and Supreme courts were against the immunity so claimed. (*Record, pp. 56–7.*) The writ of error was allowed on this point alone, and we need look only to that statute to determine whether a federal question is involved.

The statute referred to provides,

1. That a national bank shall not loan money on the security of its own stock.

2. That it shall not purchase or hold its own stock, except when necessary to prevent loss on a debt previously contracted.

This statute does not create an affirmative right on be-

half of the bank, nor say that in certain cases it shall have certain rights or immunities. On the contrary, it is prohibitory in its character, and forbids the bank from doing certain things. The claim that a federal question under this statute arose in this case, when analyzed, will be found to be based on the theory that the immunity contended for arises from the *violation* by plaintiff in error of the federal statute. Unless the statute is violated, no question arises under it, as it is purely prohibitory in its character; and the statute cannot be violated except by the action of the bank, for it is against the bank that the prohibition is directed. Stated in another way, the position of counsel is that by violating a federal statute his client secured an immunity under that statute. It is not claimed that this immunity is created by the statute in terms or by implication, but its existence is based solely on the general rule of law that a suit cannot be maintained upon a cause of action which has its origin in a violation of the law. This rule, however, is not a federal law, but a general principle of jurisprudence. It is not enforced for the protection of the defendant, but is founded upon grounds of public policy for the vindication of the law's own dignity.

"The defense (of illegality) is allowed, not for the sake of the defendant, but of the law itself. The principle is indispensable to the purity of its administration. It will not enforce what it has forbidden and denounced."

Coppell v. *Hall*, 7 Wall., 542.
Embrey v. *Jemison*, 131 U. S., 336.
Greenhood on Public Policy, 125-6.

A defense founded on this principle succeeds, not because of a right on the part of the defendant, but simply because the law leaves the parties in the situation in which it finds them. And to say that such a defense—involving as it does the acknowledged turpitude of the defendant—presents an immunity secured to the defendant by the federal law which it has violated, is a contradiction in terms.

But this rule applies only where the plaintiff is at fault, and a defendant can never predicate a defense upon his own wrong-doing unless the plaintiff is equally guilty. When a plaintiff bases his right to recover upon a transaction, as a part of which he has violated, or agreed to violate the law, he is remediless. But it is the plaintiff's wrong-doing, not that of the defendant, which destroys the cause of action. And we know of no case, and are not surprised that counsel has found none, in which the defendant's evil purpose in borrowing money has been held to be a defense to an action by the innocent lender for its recovery.

It seems to us so clear that the state courts were right in holding that the loan on the Braden note and the original purchase of the stock were entirely separate transactions that we shall not discuss at length the question as to what the result would be if the facts were otherwise. But if it were the fact that the money of the Portage Bank had been obtained as a part of this scheme for purchasing stock, it would not present a federal question nor constitute a defense to the suit. The National Bank Act contains a number of prohibitions against certain transactions by national banks which are mainly designed, like section 5,201, to regulate the conduct of its business. But the violation of these provisions does not

have the effect of enabling one party to the transaction to keep money due to the other. Thus a national bank may enforce a real estate security for a debt, although taken in violation of the prohibition of the statute.

National Bank v. *Matthews*, 98 U. S., 621.

National Bank v. *Whitney*, 103 U. S., 99.

Fortier v. *New Orleans Bank*, 112 U. S., 439.

And it may recover a loan, although it exceeds one-tenth of its capital in violation of the statute.

Gold Mining Co. v. *National Bank*, 96 U. S., 640.

II.

IF A FEDERAL QUESTION WAS INVOLVED TO ANY EXTENT, IT WAS NOT SO INVOLVED OR SO DECIDED AS TO AUTHORIZE THIS COURT TO REVIEW THE DECISION OF THE SUPREME COURT OF ILLINOIS.

If it were conceded that a federal question was involved, the case still does not fall within the class in which this court will review the decision of a state court.

1. The right or immunity claimed under the federal law must be set up in the trial court.

"To be reviewable here the decision must be against the right so *set up or claimed*. As the Supreme court of the state was reviewing the decision of the trial court, it must appear that the claim was made in that court, because the Supreme court was only authorized to review the judgment for errors committed there, and we can do no more."

Spies v. *Illinois*, 123 U. S., 131 (181).

Here the immunity now claimed was not set up in the trial court. No proposition of law, except the fifth, which was held by the court, presented as a distinct question a right arising under a federal law.

2. The federal question must be actually decided by the State Supreme court.

Blount v. *Walker*, 134 U. S., 607.

Here the State Supreme court certainly did not decide the question which is urged here as being a federal question. And the question was not even presented to it in the assignments of error on which the case was brought before it. Those assignments simply stated that the Appellate court erred in affirming and in not reversing the judgment of the Superior court. (*Record, p. 48.*)

3. The federal question must have been the controlling one in the case.

Where the record shows that the judgment of the State court might have been based either on a federal question or on some independent ground, and that it actually bases its judgment on the latter ground, the judgment is not open to review in this court. And this is so, even when the State court also decides the federal question and decides it erroneously.

DeSaussure v. *Gaillard*, 127 U. S., 216.

In the case at bar it is not denied that the State Supreme court based its judgment on an independent ground and held that the alleged federal question was not necessary to its decision.

III.

ON THE MERITS OF THE CASE THE DECISION OF THE STATE SUPREME COURT WAS RIGHT, BUT EVEN IF OTHERWISE IT IS NOT OPEN TO REVIEW.

As we have stated, there were two theories upon which the defendant in error was entitled to recover: (1) That the Chemical National Bank was liable on the note substantially as an undisclosed principal, and (2) that it was liable for money had and received.

1. That the bank was the principal in the transaction and Braden only its agent does not admit of serious dispute. The bank alone was to be benefited. It was to receive the money and it was to pay it, and this payment was to be made, not by reimbursing Braden for the liability which he assumed, but by paying the note at maturity as its own obligation. It was not a loan of money by Braden to the bank. He never had the money, but it was sent directly to the bank by Wetmore, the broker, whom it had authorized to procure the money for it. If Braden had received the money he could not have withheld it from the bank, for both he and Wetmore received it as the bank's agent. Wetmore had no interest in the matter, and the note was made payable to him merely because Braden did not know from whom he was to get the money. Wetmore's act in endorsing it without recourse shows that he had no interest and assumed no liability in the transaction.

It is entirely undisputed that the bank authorized the borrowing of the money, promised to pay the loan, and directed that the note be given in its cashier's name instead of its own. The transaction presents every element

of the ordinary case of an undisclosed principal contracting in the name of his agent. Indeed, it may well be said that the contract was rather one by the principal in the agent's name. Braden says it was agreed that the note was to be the bank's obligation, and the bank was to pay it. (*Record, p. 21.*) This is not denied. It was the bank who determined how the note should be signed. If the designation "cashier" had been added to Braden's signature there would be no doubt on the point. Can the effect be changed when that designation is omitted by the bank's direction, with the understanding that the omission shall not change the effect of the transaction?

No objection was made to the introduction of the evidence as to the circumstances and purposes of the giving of the note; the only objection was the introduction of the note itself. (*Record, p. 25.*) The propriety of the court's action in admitting the evidence is therefore not questioned.

2. *The Chemical National Bank was liable for the money obtained by means of the note.*

If it be conceded that the Chemical National Bank was not technically liable on the note, as a note, it certainly was liable for the money which, by means of the note, it obtained from the plaintiff.

a. The $5,000 was obtained not simply *for* the bank, but *by* the bank. It was the bank who needed the money and took this means of raising it, using some of its stock which it owned, as collateral. The part which Braden took in the transaction was not done in his own interest. Throughout he was acting in its behalf, and in the line of his duties. Curry, the president, and Hop-

kins, the assistant cashier, acted on behalf of the bank in assisting in carrying the matter through. There was no question of Braden dealing with himself as cashier. The other executive officers of the bank had as much to do with it as he did.

Wetmore, the payee in the note, and the broker who negotiated it with the plaintiff, was merely an agent of the bank. He had no interest in the transaction beyond his commission for selling the note, which was paid by the bank. He endorsed without recourse, and assumed no liability. His duty was to sell the note and remit the proceeds to his principal, which he did. The money was received by him as the agent of the bank, and it could, undoubtedly, have maintained suit against him if he had refused to pay it over. He was merely one of the instruments used by the bank in accomplishing its purpose.

b. The money was obtained from the plaintiff, the City Bank of Portage. The note was in the hands of the Chemical National Bank—through its agent, Wetmore—until the plaintiff advanced the money on it. The money was paid to the bank's agent, Wetmore, and by him to the Chemical, through its correspondent. But if Wetmore be not regarded as technically an agent, he was at least the channel through which the money went directly from the City Bank to the Chemical.

c. The Chemical National Bank has never paid the money to any one.

Here, then, are a lender, a borrower, and all the elements of a loan of money from one to the other.

The case also presents all the features necessary to sustain the action for money had and received. That

action is an equitable one, based upon equitable grounds, and can always be maintained where the defendant has money which in equity and good conscience he ought not to be permitted to retain. *Laflin* v. *Howe*, 112 Ill., 253 (262); *Barnes* v. *Johnson*, 84 *id.*, 95. What can be said in defense of an action tried by those rules, upon the facts here conceded to exist? That the plaintiff in error is to pay this money to some one cannot be doubted. The proposition that it could obtain the money, repudiate the means by which it was obtained and wholly escape liability, could not be tolerated. That the defendant in error is the person entitled to receive the money is beyond question. There is no liability to Braden, and could not be, except to reimburse him if he had to pay the note. A payment made to him would inure to the benefit of the Portage Bank. The Chemical National is the person liable to pay, and the Portage Bank the person entitled to receive the money.

Against all these strong equities the plaintiff in error offered nothing in defense, except the claim that it obtained the plaintiff's money for an illegal purpose, and therefore should be permitted to keep it. No charge was made that the plaintiff participated in the evil design, knew of it, or had any reason to suspect it. It is the defendant's own wrong which was paraded in its defense, and that wrong does not furnish it with protection against a just claim.

National Bank v. *Case*, 99 U. S., 628.

The questions as to the liability of the plaintiff in error on the note or for the money obtained upon it are not federal questions but depend upon the state law. And the decisions of the state courts upon those points, upon

the effect of the evidence and the questions of facts involved are not reviewable here.

Murdock v. *Memphis*, 20 Wall., 590.

We submit that the writ of error should be dismissed for want of jurisdiction, or the judgment of the Supreme court of Illinois affirmed.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1895.

No. 736.

CHEMICAL NATIONAL BANK OF CHICAGO, *Plaintiff in Error,*
vs.
CITY BANK OF PORTAGE, *Defendant in Error.*

Error to Supreme Court of Illinois.

BRIEF AND ARGUMENT FOR PLAITIFF IN ERROR IN REPLY.

HIRAM T. GILBERT,
FOR PLAINTIFF IN ERROR.

BARNARD & MILLER, PRINT., CHICAGO.

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Brief and Argument for Plaintiff in Error in Reply.

May it please the Court :

Before replying to the points attempted to be made by counsel for defendant in error in their brief and argument, we will briefly call the court's attention to the apparent endeavor made on behalf of defendant in error to give the testimony introduced upon the trial a construction which it will not bear

In their brief and argument (pages 2, 3) counsel insist that it was proven at the trial that the Chemical National Bank in the early part of 1893 had taken in some of its own stock in payment of a debt; that the stock thus taken in was treated as treasury stock; that it was part

of this treasury stock that was used as collateral security for the Hopkins note, and *that the money procured on that note was paid to the bank, Hopkins not receiving any of it.*

We have already shown in our opening brief and argument (pages 4, 5, 24–28) that the sole support for their contention that the stock in question was stock that had been thus taken in is Braden's testimony on *direct* examination (Rec., 15–18), which, upon *cross*-examination (Rec., 22–24), he admitted was founded solely upon hearsay.

As to the assertion of counsel for defendant in error *that the money procured on the Hopkins note was paid to the bank and that Hopkins received no portion of it*, it is sufficient to say that it has no support whatever in the evidence. Even Braden, who was apparently a very willing witness in favor of the defendant in error, testified in reference to the Hopkins note (Rec., 16) as follows:

"Q. For what had that note been given?

"A. Some of the same stock, and I suppose that had "been bought in by the bank."

But even had he testified that the bank received the money his testimony would have been worthless, because, as he subsequently stated, it was hearsay.

But it is said by counsel for defendant in error in their brief and argument (p. 4) that none of the facts testified to by Braden were denied by Curry, the witness who testified in favor of plaintiff in error, and that while it seemed to be Curry's impression that the stock which was attached as collateral to the Braden note was purchased outright, he does not state the fact positively. Even were this true, it would not help the case of defend-

ant in error. The testimony of Braden in reference to the matter being merely hearsay, the only legal testimony upon the subject was that of Curry, and as he certainly gave no testimony to justify the inference that this stock was stock that had been taken in to secure the payment of debts due to the bank previously contracted in good faith, there is no testimony at all tending to support this contention of defendant in error as to an affirmative fact which it was necessary for it to establish in order to make plaintiff in error liable. But counsel for defendant in error are not justified in saying that Curry's testimony on this subject was a mere impression. This will be apparent from the following question propounded to and answer given by him. (Rec., 28):

"Q. The stock was bought by Hopkins, was it not, "giving his note for it?

"A. Well, that was a settlement for it; yes, sir. It "was bought in pursuance of the order given me and I "gave to the broker."

We do not see how testimony could well be more positive than that given by Curry with reference to this transaction. Apart from this, the fact that this stock was not taken in to secure the payment of a debt to the bank previously contracted in good faith is supported by the circumstance that the officers of the bank engaged in this transaction studiously avoided every act that would have been calculated to make the transaction one of the bank itself. Had the stock been taken in in the manner contended for by the defendant in error, the transaction would have been a perfectly legitimate one, and there would have been no reason why it should not have appeared on the books of the bank as a transaction of the bank itself. Again, if the Hopkins note had been given

to evidence a loan procured by the bank and of which it received the proceeds, the books of the bank would have shown not only the receipt by the bank of the proceeds of the loan, but also the payment thereof when the Hopkins notewas taken up. The very fact that when the Hopkins note was taken up the stock, as Curry says, (Rec., 28), "was treated as cash over one night," to take the place of the money of the bank used to pay the Hopkins with, no entry of the transaction being made upon the bank's books, is conclusive evidence that the Hopkins note did not represent a loan, but did represent the purchase price of the stock.

We do not care to make any further reference to the manner in which counsel for defendant in error have treated the evidence in their brief and argument. In our opening brief and argument we have stated the evidence as we understand it, and have referred the court to the pages of the record where it may be found, and we can safely assume that, if our statement of the facts is correct, it will be so found by the court, notwithstanding any incorrect statements as to the facts that may be found in the brief and argument of counsel for defendant in error.

With these preliminary observations we shall proceed to briefly reply to the points made by counsel for defendant in error with respect to the questions of law presented by the record.

I.

THERE IS A FEDERAL QUESTION INVOLVED IN THE CASE.

It is insisted on behalf of defendant in error that there has not been in this case a decision against a title, right, privilege or immunity set up or claimed by plaintiff in error under the statutes of the United States. This claim however, cannot be maintained.

As we have already shown in our opening brief and argument, the plaintiff in error claimed immunity from liability to the defendant in error, by virtue of those provisions of the national banking act which regulate the powers of national banks and of their officers, and prohibit national banks from purchasing shares of their own stock, unless such purchase "be necessary to prevent "loss upon a debt previously contracted in good faith," its contention being, in effect, that to hold it liable under the facts supposed in the several propositions, which facts were supported by the evidence, would be in effect to decide either, *first*, that the cashier of a national bank has implied power to borrow money in its behalf, or *second*, that the officers of a national bank have implied power to bind it by a purchase of shares of its own stock, made in the individual name of one of them, and under circumstances where the purchase of such stock, if made by and in the name of the bank itself, would be an illegal transaction.

It will, doubtless, not be contended that it was necessary for the plaintiff in error, for the purpose of presenting the federal questions concerning which it desired the decision of the trial court, to ask the trial court in express and distinct terms to hold as law applicable to the

decision of the case the abstract propositions that a cashier of a national bank has no implied power to borrow money in its behalf, and that the officers of a national bank have no implied power to bind it by a purchase of shares of its own stock made in the individual name of one of them, and under circumstances where such purchase, if made by and in the name of the bank itself, would have been illegal. Nor was it material that either the trial court or the counsel for defendant in error should have been aware at the time the propositions were passed upon that the decision of the court thereon involved federal questions. On the contrary, it is self-evident that the questions referred to were, for the purpose of a review by this court, sufficiently presented to the trial court, if the propositions with respect to which it was asked to rule could not be refused without deciding one or both of those questions adversely to the plaintiff in error.

That the refusal of the propositions which plaintiff in error asked the trial court to hold as law applicable to the decision of the case, and particularly the first, second and third propositions, did involve a ruling of that court adversely to the defendant in error, in respect to the questions suggested, is too evident for serious discussion. The case stated in those propositions, when stripped of all immaterial circumstances, is that of a purchase by officers of a national bank of shares of its own stock in the individual name of one of them, the giving by that one of his individual note for the purchase price, the use by the cashier of the bank's money to pay that note, and the borrowing by him upon his individual note of the money necessary to replace the money of the bank thus unlawfully used. Whether such a case creates a liability against the national bank, manifestly depends upon

the provisions of the Revised Statutes, defining and limiting its powers, and the powers and duties of its officers.

But it is suggested by counsel for defendant in error in their brief and argument (p. 9) that the question of the cashier's authority in any particular transaction is not solely one of federal law, but one of agency, depending upon the general principles of law relating to agency and to corporations, and that upon such a question a state court, in a suit against a national bank, has the right to decide in such a way as to suit itself and is not bound to follow the decisions of this court. The absurdity of this suggestion is too apparent to require serious discussion. If this court has jurisdiction to decide what are the powers of national banks and of their officers, it must also of necessity to have the power to decide in a case presented whether those powers have been exceeded. To confine it to the decision of what those powers are in the abstract and to confide solely to the state courts to determine whether those powers have been properly exercised in the case in question would be nothing more than giving it the power to declare the law without the right to determine its proper application.

Without pursuing this subject further we deem it sufficient to point out that the propositions of law presented to and refused by the trial court, distinctly raise the question whether, under the laws of the United States governing national banks, its cashier Braden had the power to bind it and make it liable with respect to the transaction with the defendant in error, and that question must necessarily be one with respect to which this court has the power to review the judgment of the Supreme Court of Illinois.

II.

THE FEDERAL QUESTION INVOLVED WAS ERRONEOUSLY DECIDED BY THE STATE COURT.

As to this point we shall content ourselves with referring the court to our opening brief and argument, and the suggestions there made, and a few additional observations upon one peculiarity of the argument filed on behalf of defendant in error.

All through their argument counsel for defendant in error persist in treating this entire transaction as a transaction of the bank itself, just as if it had been the act of its governing body, *i. e.*, its board of directors. They assert that the *bank* needed money, that the *bank* borrowed defendant in error's money, that Braden was acting in the *bank's* behalf and in the line of his *duties*, that Wetmore, the broker named as payee in the note, was the agent of the *bank* and was merely one of the instruments used by the *bank* in accomplishing *its* purposes, and that "*it is entirely undisputed that the bank authorized the borrowing of the money, promised to pay the loan, and directed that the note be given in its cashier's name instead of its own.*" (Brief, pages 20 to 22.)

Starting with such premises as these it is quite easy for them to build up a very plausible argument to show that the bank was liable to defendant in error for the money loaned. When, however, it appears, as it does, that the very question to be determined is whether the bank, under the facts disclosed by the evidence, can, *as a matter of law*, be held to be the borrower of the money, it cannot be perceived how the court can obtain any real aid from an argument which assumes as an existing fact that the existence of which is the very matter in dispute.

If in the case at bar the bank had authorized the borrowing of the money, promised to pay the loan and directed that the note be given in its cashier's name instead of its own, we would not be here insisting that it could not be held liable for repayment. Our contention, however, is that the bank did not borrow the money, did not promise to pay the loan and did not direct that the note be given therefor, but, on the contrary, the transaction was an individual transaction of the executive officers of the bank, with respect to which they had neither express nor implied power to make the bank liable.

III.

THERE WAS NO OTHER MATTER OR ISSUE ADJUDGED BY THE STATE COURT SUFFICIENTLY BROAD TO MAINTAIN THE JUDGMENT NOTWITHSTANDING THE ERROR IN THE DECISION OF THE FEDERAL QUESTIONS.

If it appeared in this case that the judgment of the state court could be based upon some ground that was independent of any federal question it would, of course, follow that it would not be open to review by this court, even if the decision of the state court as to the federal questions had appeared to be erroneous. But the record in this case shows no such independent ground as can be held sufficient to support the judgment of the State court. Counsel for defendant in error in their brief and argument (p. 19) do, indeed, say that "in the case at bar it "is not denied that the State Supreme Court based "its judgment on an independent ground and held that "the alleged federal question was not necessary to its "decision." But in this they evidently misapprehend our position. While it is true the Supreme Court of Illinois in their opinion, say, that "the purchase of the

" stock and the borrowing of the money from plaintiff " were two distinct transactions," that the bank paid the Hopkins note with its own funds and afterwards applied to the plaintiff for a loan and obtained it, it is self-evident they could only arrive at these conclusions by means of an erroneous decision of the federal questions involved in the case. If there was no implied power on the part of Curry, Hopkins and Braden to purchase the stock, use the money of the bank in payment therefor, borrow money from defendant in error to replace the money thus used, and by so doing to make the bank liable to the lender of the money for repayment, as we contend there could not be in view of the provisions of the Revised Statutes of the United States, it follows as a matter of course, that the purchase of the stock and the borrowing of the money from plaintiff were not two distinct transactions, that the bank did not pay the Hopkins note and that the bank did not apply to the plaintiff for a loan of money or obtain it, but had nothing whatever to do with the transaction. Indeed, it seems too plain for argument that there can be in this case no independent ground not involving a federal question sufficient to support the judgment of the State court, but that on the contrary, had the State court ruled correctly as to the propositions presented on behalf of plaintiff in error, it must necessarily have entered judgment in its favor.

We respectfully submit that this court has jurisdiction in this case; that the federal questions involved are decisive; that the decision of the State court with respect thereto was erroneous, and that accordingly the judgment should be reversed and the cause remanded.

HIRAM T. GILBERT,
For Plaintiff in Error.